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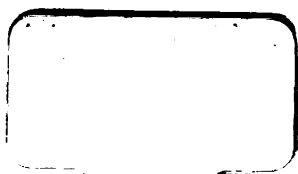
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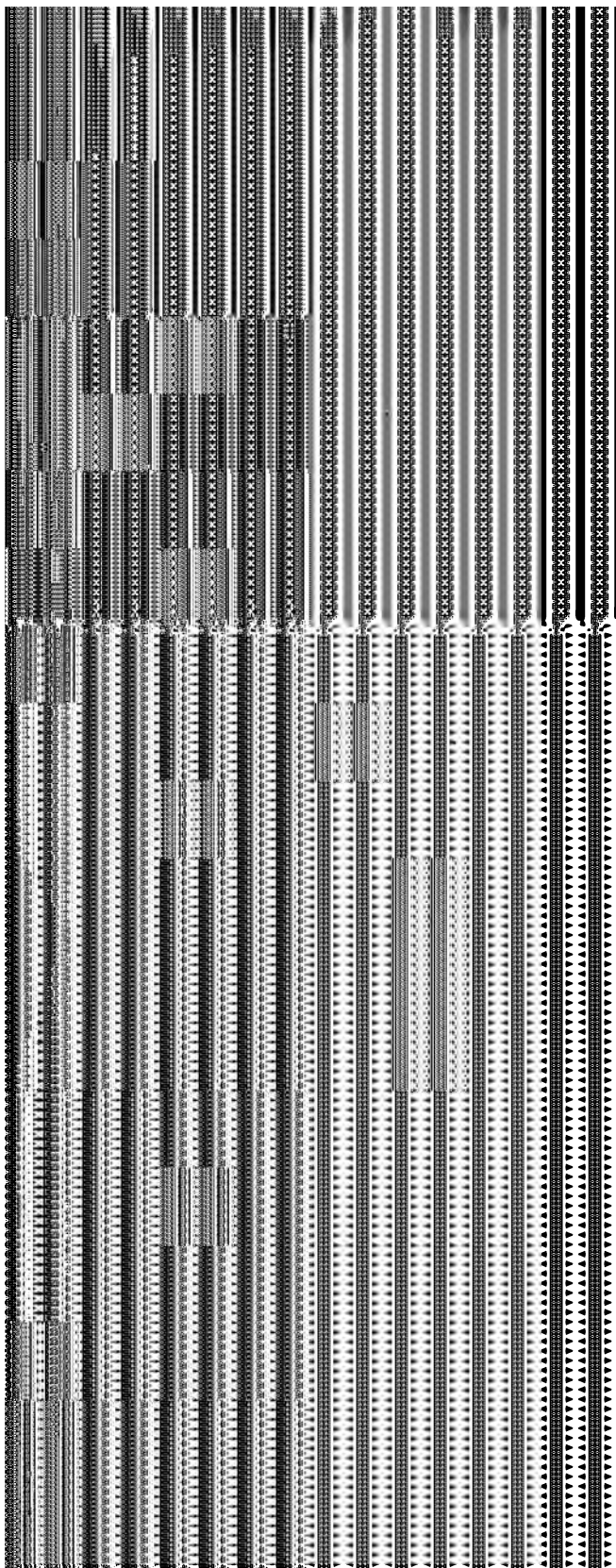
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CASES

DETERMINED IN THE

UNITED STATES CIRCUIT COURTS

For the Eighth Circuit.

BY THE

HON. SAMUEL F. MILLER, LL.D.,

ONE OF THE ASSOCIATE JUSTICES OF THE SUPREME COURT.

REPORTED BY

JAMES M. WOOLWORTH,

COUNSELLOR-AT-LAW.

VOL. I.

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CHICAGO :
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JUDGES
OF THE
UNITED STATES CIRCUIT COURTS,
In the Eighth Circuit.

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Supreme Court.

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HON. MARK W. DELAHAY, Kansas.

HON. ELMER S. DUNDY, Nebraska.

HON. HENRY C. CALDWELL, Arkansas.



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DISTRICT OF KANSAS.

MAY TERM, 1863.

Before Mr JUSTICE MILLER.

THE UNITED STATES *v.* WARD.

I. **FEDERAL JURISDICTION OF MURDER.**—Congress is competent to legislate in respect of murder only where the crime is connected with some subject matter, or was committed in some place, which brings it within the exclusive jurisdiction of the Federal government.

II. **JURISDICTION OVER INDIAN RESERVATIONS IN KANSAS.**—

1. *The act of June 30, 1834* (4 Statutes at large, 729), confers upon the Federal courts jurisdiction of offences against the laws of the United States, committed on Indian reservations in Kansas, unless subsequent legislation has withdrawn the locality from that jurisdiction.

2. *The act admitting the State* into the Union withdraws all such territory from the Federal jurisdiction, with an exception therein stated.

3. *The exception*, mentioned in the act, of territory thus withdrawn from the Federal jurisdiction, is territory of Indians having treaties with the United States, which provide, that without their consent, such territory shall not be subjected to State jurisdiction.

4. *The converse* is inferable, that Indian territory, not protected by such treaty, is brought within and subjected to State jurisdiction.

THIS was an indictment for murder. The defendant was a white man, and the person killed was also a white man. The homicide was committed on the reser-

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vation of the Kansas tribe of Indians, and in the county of Lyons. This reservation was provided by a treaty with the tribe, and was occupied by it. It was a small tract, nine miles in width, by fourteen in length. It lay in three counties of the State—namely, Waubunee, Morris, and Lyons ; which counties were organized, and the courts of the State, with general civil and criminal jurisdiction, were held in each.

To the indictment there was a plea to the jurisdiction, by which the defendant insisted that the offence charged against him was not committed within the exclusive jurisdiction of the United States, and that the courts of the State of Kansas could alone take cognizance of it. To this plea there was a demurrer. The question was, whether the reservation of the Kansas Indians was within the sole and exclusive jurisdiction of the United States. In determining this question, the court examined the following provisions of law.

The act entitled “ An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers,” approved June 30, 1834 (4 Statutes at large, 729), in its 1st section provides : “ That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and also that part of the United States east of the Mississippi river, and not within any State, to which the Indian title has been extinguished, for the purposes of this act, be taken and deemed to be the Indian country ;” and in its 25th section it provides : “ That so much of the laws of the United States as provides for the punishment of crimes committed

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within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country, provided the same shall not extend to crimes committed by one Indian against the person or property of another Indian."

The act entitled "An act for the admission of Kansas into the Union," approved January 29, 1861 (12 Statutes at large, 126), provides in its 1st section: "That the State of Kansas shall be, and is hereby declared to be, one of the United States of America, and admitted into the Union on an equal footing with the original States, in all respects whatever;" . . . "*provided* that nothing contained in the said constitution [of the State] respecting the boundary of said State, shall be construed to impair the rights of person or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with such Indian tribe, is not, without the consent of such tribe, to be included within the territorial limits or jurisdiction of any State or territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the State of Kansas, until said tribe shall signify their assent to the President of the United States, to be included within said State."

MR JUSTICE MILLER.—The circumstances, much enlarged upon at the bar, that the reservation is but a small tract of country, that emigration has filled up the adjoining lands, that the State has included the *locus in quo* within

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an organized county, and by its courts of justice, and its people, by their customs and intercourse, have assumed new and close relations to this tribe of Indians, afford no assistance in determining the question before us. The argument drawn from these circumstances assumes that the State has authority to legislate over these lands; and that is the very point in question. Or, if it be conceded that at one time the sole and exclusive jurisdiction was in the United States, the contention of the counsel for the defendant is based on the assumption that circumstances—the changed condition of affairs—has withdrawn that jurisdiction from the Federal and conferred it upon the State government: the statement of which position shows its fallacy. We must recur to the provisions of law, as written in the statute books and the treaties, for an answer to the question before us. *Worcester v. Georgia*, 6 Peters, 515; *United States v. Cisna*, 1 M'Lean, 254.

The authority of Congress to provide for the punishment of crime is limited to such subjects and circumstances as are peculiar to the Federal government. That government may coin money, and therefore Congress may provide for the punishment of counterfeiting the national coin. It may establish post-offices and post-roads, and may punish robbing its mails; but it cannot punish counterfeiting the issues of State banks, nor robbing express companies. It may punish murder, when it is committed under certain circumstances or in certain places, as when the murdered person is its officer, and at the time of the assault was in the discharge of his official duties, and the killing was in resistance

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to him therein ; or when the homicide was committed in some place over which the National government had sole and exclusive jurisdiction, as, for instance, over forts, arsenals, &c.

Jurisdiction is claimed here to punish this homicide, because it was committed on an Indian reservation. That circumstance alone is not sufficient to give us jurisdiction. There is no act of Congress giving the Federal courts jurisdiction of every murder committed on any Indian reservation. We have jurisdiction only when such reservation is " within the sole and exclusive jurisdiction of the United States." The act of June 30, 1834, provides, that the section of country in which this reservation is situated shall be Indian country, and that the laws of the United States for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force therein.

This provision brings the reservation within our jurisdiction. If it remained unchanged or unqualified, it would conclude the question. It is insisted that the provisions of the act organizing the territory, and the act admitting the State into the Union, withdraw the locality from the force and effect of the act. It is unnecessary to consider the former of these enactments, as all that can be claimed under it, may be found in the latter.

The first clause of this act provides, that the State shall be admitted into the Union, " on an equal footing with the original States, in all respects whatever." Congress does not possess the power to withdraw from

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any one of the original States, without its consent, the authority to try and punish a man for murder, even in the smallest portion of its territory. It cannot be said of the new State of Kansas, that she stands upon "an equal footing with the original States in all respects whatever," if Congress can take from her courts, and vest in us, jurisdiction to try a man for murder committed within the State ;—if Congress can, without her consent, exclude her from the right and the power to enforce the laws which she has made, for the protection of the lives, persons, and property of her citizens, on every portion of her soil. This power to enforce her criminal laws throughout her boundaries, which is unqualified and exclusive, and is to be possessed, enjoyed, and exercised by the new State alone, and not concurrently with the Federal government, is a necessary incident to her equality with the original States. It follows, then, unless the clause above cited in the act admitting Kansas into the Union is qualified by some other provision, it operates as a repeal of the act of 1830, so far as that State is concerned, and we are without jurisdiction.

But there were, at the time of the passage of the act of admission, tribes of Indians within the boundaries of the new State, as described therein, with which the United States had treaties ; and in these treaties the government stipulated that their lands should never be brought within the bounds, nor subjected to the jurisdiction, of any State. Among other such tribes, we may mention the Shawnees. A treaty had been made with this tribe, giving and assuring to it certain lands ; and by the 10th

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article it was provided, that "the United States guarantee that said lands shall never be within the bounds of any State or territory, nor subject to the laws thereof" (7 Statutes at large, 355, 357). It is evident that the Congress which passed the act of admission apprehended the principle above expressed, and foresaw the predicament in which the United States would be placed, if it admitted the State without any provision for such Indians, and for the lands of such Indians, as had treaties containing such a guarantee. It was foreseen that when once Kansas was admitted into the Union upon an equal footing with the original States in all respects whatever, the general government could not protect these obligations.

Accordingly a proviso was annexed to the clause declaring Kansas in the Union. By this proviso, all territory was excepted out of, and was not to be included within, the State, which belonged to a tribe having such a treaty. So that, recurring to the case of the Shawnees, their reservation was not in the State. It was within the outside boundaries of the State, as described in its constitution, and yet was without the State, without its jurisdiction, and without its territory.

And the converse of this proposition is inferable; that is, that Congress intended to, and did, concede to the new State, and it acquired and holds irrevocably, except as it sees fit to surrender the same, full right and authority to legislate, to enforce her laws, and to exercise plenary jurisdiction, over all such parts of her territory as were not covered by such treaties. Or rather, to express the matter more exactly, all territory which was not covered

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by such treaties was included within the State, within its jurisdiction and within its territory; and this irrevocably, unqualifiedly, and exclusively.

It remains now to inquire whether the reservation here in question is within the proviso; whether the Kansas tribe of Indians, upon whose reservation this homicide was committed, had such a treaty with the United States, as the Shawnees have been shown to have had, in which it was guaranteed to them by the United States that their reservation should not be brought within any State, nor subjected to its laws. If it had a treaty with such a clause, then the reservation was not in the State, and is subject to Federal jurisdiction. On the other hand, if it had not a treaty with such a clause, then the reservation was within the State, and is subject to the State jurisdiction.

This question is to be determined by an examination of the treaty with this tribe, in order to see whether or not it contains such a clause. The last treaty with the tribe was made in 1859, and ratified in 1860 (12 Statutes at large, 1111), and is before us. We have carefully examined it, and find that it does not contain the guarantee mentioned. It is conceded by the counsel for the government, that none exists in any former treaty with this tribe.

It therefore results that the State of Kansas has jurisdiction to try and punish the defendant for the offence set forth in this indictment: it follows that we have not jurisdiction.

The case of the United States v. Bailey (1 M'Lean's Reports, 234), although decided before the act of 1834 was passed, and therefore not directly in point, is, in

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its reasoning, strongly corroborative of the views which we have taken. No other case decided by a Federal court, bearing on the case before us, has been brought to our attention.

The demurrer to the plea must be sustained, and the case dismissed for want of jurisdiction.

Demurrer sustained and bill dismissed.

See The Kansas Indians, 5 Wallace, 737 ; and The New York Indians, *ib.*, 761.—[*Reporter.*]

DISTRICT OF KANSAS.

OCTOBER 28, 1863.

Before Mr JUSTICE MILLER, at Chambers.

ROSS v. THE UNION PACIFIC RAILWAY
COMPANY (EASTERN DIVISION).

I. AN INJUNCTION ON A BILL FOR SPECIFIC PERFORMANCE.—

1. *When allowed* on a bill for specific performance of a contract, an injunction should be granted, if, upon the case made therein, the court ought to entertain it, and the defendant will, probably, before the hearing, render itself incapable of executing the contract specifically.

2. *When not.*—But if it does not state a case on which, at the hearing, specific performance will be decreed, an injunction, which is sought only to make the final decree effective, ought not to be allowed.

II. SPECIFIC PERFORMANCE OF CONTRACTS.—

1. *Not for delivery of government bonds.*—Bonds of the United States are public stocks, and a covenant for their delivery will not be specifically enforced in a court of equity.

2. *Nor of railroad shares.*—The reason of the case is in favor of holding the same rule in respect of shares in a railroad company.

(1.) They belong to a class of securities generally called stocks, are bought and sold every day in the market, and the prices at which they sell are quoted in the commercial reports: one share has no peculiar value. The damages for failure to deliver them may be awarded at law, and afford complete compensation.

(2.) So are the earlier cases.

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3. *Nor unless complete relief afforded.*—Unless the court can decree specific performance of the whole of a contract, it will not interfere to enforce any part of it; *e.g.*, a contract for the delivery of both government stocks and railroad bonds—assuming that the latter may be compelled—cannot be enforced.

4. *Nor unless remedy mutual.*—An executory contract will not be specifically enforced unless the remedy is mutual.

III. WHEN CONTRACT EXECUTORY.—The performance of a comparatively inconsiderable part of a contract, *e.g.*, the expenditure of \$50,000 in building a railroad which will cost \$12,000,000, does not take it out of the class of executory contracts.

IV. BUILDING CONTRACTS, WHEN ENFORCED.—

1. *Not of railroad.*—A contract to build a railroad will not be enforced in equity.

2. *Nor other such contract.*—The case of *Lucas v. Comfort* (3 Brown, Ch., 166), in which Lord Thurlow refused to enforce a building contract, saying that the court would not undertake to superintend the construction of a building, has not been overruled; and the cases in which it has been held otherwise are distinguishable from it.

3. *When such contracts have been enforced.*—The cases in which specific performance of building contracts has been decreed in equity, are where—

(1.) The building was to be done upon the land of the person who agreed to do it.

(2.) The consideration for the agreement was the sale or conveyance of the land on which the building was to be erected, and the plaintiff had already, by such conveyance, on his part, executed the contract.

(3.) The building was in some way essential to the use, or contributory to the value, of adjoining land belonging to the plaintiff.

(4.) The court could dispose of the matter by an order capable of being enforced at once; it will not decree a party to perform a continuous duty extending over a number of years.

THE act of Congress incorporating the Union Pacific Railroad Company granted the same aid to the Leavenworth, Pawnee, and Western Railroad Company

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as it did to the main line; that is, a certain amount of land and of government bonds per mile. The last-named company was incorporated by the legislature of Kansas, and by an act of the same legislature, its name was changed to the Union Pacific Railway (Eastern Division).

On the 19th of September, 1862, this company, by its former name, entered into a contract with Ross, Steel, & Co., the substance of which, so far as it is material to be stated here, was as follows:

Ross, Steel, & Co. agreed to furnish all the materials for, and to construct, complete, and equip a first-class railroad from the mouth of the Kansas river, on the south side thereof, to the one hundredth meridian, together with necessary buildings, &c., according to a certain prescribed standard, of the best available material, with a branch to Leavenworth; to locate the line according to the act of Congress above mentioned, and upon the most feasible route, with the easiest curves and grades practicable; to commence the work on the 1st day of November, 1862, and complete the same within the time prescribed by the act.

The company agreed to pay for the work, as each section of forty miles was completed, at rates per mile as follows: 1st, \$16,000 in United States bonds; 2d, \$11,500 in bonds of the company, secured by mortgage on all its property and earnings; 3d, \$6,000 in full paid stock of said company. These payments are to be made as each section of forty miles is accepted by the United States commissioners, as provided for in the act. As each section is completed, it is to be turned over by the contractors to the company, the same to be kept in good

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order and condition until accepted by the commissioners. The company was also to appoint three persons to act as trustees for the holders of its mortgaged bonds, and superintend the issue, sale, and cancelling of them, and the payment of interest thereon. Disagreements arising between the parties in the course of the work were to be referred to the arbitrament of an engineer named, whose decision was to be final; and should he decide that the work was not progressing with sufficient rapidity, the company was to be at liberty to put on an additional force to carry it forward, so long as Ross, Steel, & Co. neglected to do so.

Ross, Steel, & Co. entered upon the execution of this contract. They expended some \$50,000 upon the grading, and had about one hundred men employed on the work, and had made provision in the way of material and capital for pushing the work forward with vigor. No payments had been made by the company. About the 1st of June, 1863, General John C. Fremont and Samuel Hallett purchased almost all of the stock of the company, and thus obtained entire control of its affairs. Shortly afterwards they notified Ross, Steel, & Co., that they should ignore the contract, and construct the road themselves. Some negotiations were had between the parties, but they finally separated, the one side insisting upon, and the other repudiating, the contract.

About the 15th of June, 1863, a deed of trust, in the name of and by the company, was executed to Washington Hunt and Samuel B. Ruggles, as trustees, of all the line of railroad built and to be built, with its equipment, to secure certain bonds to be issued thereunder, to

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the amount of \$5,760,000; and on the 1st day of July, another deed of trust was in like manner made to the same trustees of the lands of the company, to secure other bonds to be issued thereunder, to the amount of \$7,200,000. These deeds of trust completely disposed of all the assets of the corporation, and conveyed away the entire property upon which Ross, Steel, & Co. were to be secured for building the road. No bonds had yet been issued under either of the deeds of trust.

The parties have also given it out that the said company have made a contract with Hallett for the construction of the road.

The object of the bill was to enjoin the issue of the bonds under the two several deeds of trust, and have them delivered up to be cancelled; and for a decree compelling the specific performance of the contract.

A motion was now made for an injunction and was argued by

Mr Browning and *Mr Joy*, in support thereof.

Mr Ewing and *Mr Stinson*, *contra*.

MR JUSTICE MILLER.—This is an application for an injunction, on a bill filed in the circuit court of the United States for the district of Kansas.

The material matters set forth in the bill may be shortly stated thus: In September, 1862, the plaintiffs, under the partnership name of Ross, Steel, & Co., contracted with the defendant, under the corporate name of The Leavenworth, Pawnee, and Western Railroad Company, which has since been changed to its present style, that they would build for it a railroad in the State of Kansas,

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some 350 miles in length, the same to be part of the great Pacific Railway provided for by the act of Congress.

The defendant, on its part, agreed to pay for said road, as each section of forty miles should be built, equipped, and furnished ready for use, and accepted by the commissioners, as provided in the act of Congress, the sum of \$33,500 per mile.

This sum was to be made up as follows: \$16,000 of the bonds of the United States, to be issued under said act; \$6000 of the paid-up stock or shares of the company; and \$11,500 of the bonds of the company, secured by a first mortgage on the road and its appurtenances, and on the land granted by the government to aid in its construction.

The plaintiffs have done work and furnished material to the value of \$40,000 or \$50,000. They have made extensive arrangements for procuring the necessary capital, and for the purchase of the iron; and are fully ready and able to prosecute the work, diligently and successfully. But the defendant has notified them that their contract is forfeited, and the work covered by it he has employed other parties to perform.

To secure its bonds, which are to be delivered to the new contractors for their work, the defendant has made two mortgages on the road and its appurtenances, and on its lands. These mortgages are entirely different from those which are provided for in the contract with the plaintiffs, and if the bonds are issued thereon, the defendant will be unable to comply with its covenants to

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them in relation to the same subject matter. The bonds have not been issued yet. The bill therefore prays for an injunction to prevent their issue, and, on final hearing, that the defendant may be decreed specifically to perform its covenants in said contract, and for general relief.

If, for the purpose of compelling the parties to perform specifically their contract, the court, on the case made by the bill, ought to entertain it, it should grant the injunction; because, otherwise, before a hearing on the merits, the defendant would probably render itself incapable of giving to the plaintiffs first mortgage bonds as it has agreed to do.

On the other hand, if, on the hearing, specific performance will not be decreed, there is no ground for the injunction, which is sought only for the purpose of making the final decree effective.

We are called upon, then, to inquire, in the first place, whether the case made by the bill is one in which a court of equity will decree specific performance of the contract.

In considering the question of the jurisdiction of the court to enforce them by decree, the covenants of the defendant may be treated as requiring the delivery of three kinds of securities—namely: 1. The bonds of the United States provided to be issued by act of Congress; 2. The paid-up shares of the company; 3. The bonds of the company secured by mortgage.

1. The bonds of the United States are stocks within any definition which can be given to that term. They are public stocks, government stocks. The decisions are

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clear and uniform, that a covenant for their delivery will not be specifically enforced in a court of equity. 2 Story's Eq. Jurisprudence, §§ 717, 717 *a*, 718, 724 *a*.

The cases cited in the notes to these sections of Judge Story's work (Redfield's edition) fully sustain this doctrine. They cover a period of two hundred years, coming down to the present time. In reference to this class of stocks, no case is cited to the contrary.

2. As to the shares in the railroad company, I think the rule should be the same. I see no sound reason for any distinction between them and government stocks. They belong to a class of securities which are generally called stocks; they are the subject of every day sale in the market, and the rates at which they are selling are quoted in the public commercial reports, so that their value is as readily and certainly ascertained as that of government stocks. No especial value attaches to one share over another, and the money which will pay for one, will as readily purchase another.

The damages, then, for failure to deliver any such shares may be awarded at law, and be an adequate compensation for the injury sustained.

And this has been the holding of the courts for a hundred years. *Cud v. Rutter*, 1 P. Williams, 570, 5 Vin. Ab., 538, decided in 1719, was a bill to compel the delivery of South Sea stock according to a contract alleged. Lord Chancellor Parker, "delivering his judgment with great clearness," as the reporter says, held, "That a court of equity ought not to execute any of these contracts, but to leave them to law, where the party is to recover damages, and with the money may, if he please,

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buy the quantity of stock agreed to be transferred to him; for there can be no difference between one man's stock and another's. It is true, one parcel of land may vary from, and be more commodious, pleasant, or convenient than another parcel of land, but £1000 *South Sea* stock, whether it be A., B., C., or D.'s, is the same thing, and in no sort variant; and therefore let the plaintiff, if he has a right, recover in damages, with which, when received, he may buy the stock himself." So also are *Cappur v. Harris*, Bumb., 135; *Dorison v. Westbrook*, 5 Vin., 510, pl. 22.

In all the cases in which in former times specific performance was decreed, the reason existed, and the court proceeded upon the reason that damages at law afforded no sufficient compensation, on account of some peculiarity in the stock contracted to be delivered, or in the situation of the parties. Of this class are *Colt v. Netterville*, 2 P. Williams, 304; *Buxton v. Lister*, 3 Atk., 383; *Gardner v. Pullen*, 2 Vern., 394.

In England, by recent decisions, the jurisdiction seems to have been extended beyond the early cases. In them it has been said that there is no analogy between government stock and railroad shares, because the latter are limited in amount, and are not always to be had in the market. *Duncuft v. Albrecht*, 12 Simons, 189; *Shaw v. Fisher*, 5 Railw. C., 465; *Parish v. Parish*, 32 Beav., 207.

Whether the distinction taken in these cases shall be held finally to prevail in this country, and, if it be established, whether it shall be held applicable in principle to cases like this, I need not now determine. But conceding that if this contract called for only the shares

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in the company and its bonds, a specific performance of it might be decreed by this court, how does the case stand when the first-mentioned class of property, as to which we have seen that the contract cannot be specifically enforced, is coupled with the other two classes?

If this bill can be maintained, we are to suppose that when the first section of fifty miles of road is completed, the plaintiffs will call on the court to compel the defendant to perform the contract to that extent. There will then be due from the defendant to the plaintiffs \$1,675,000; \$800,000 of which will be payable in government stock, of which this court cannot compel the delivery, and \$875,000 in railroad shares, of which delivery may be decreed.

Now, will the court, on a covenant, which is a unit, give the plaintiffs this partial relief, and as to one half of it in nominal amount, and perhaps more than one half in value, turn them over to a court of law for damages? In a court of law, strict and technical performance, on the part of the plaintiffs, of their covenants is essential to a recovery. In a court of equity, time is not of the essence of the contract. Thus the contract becomes subject, in different courts, to wholly different rules of construction, and to different kinds of relief, which may prove, in reality, both a snare to the plaintiffs, and a detriment to the defendant.

And this has been ruled in several cases. Thus in *Gervais v. Edwards*, 2 Dr. & W., 80, Sir Edward Sugden in Ireland held that, unless the court can decree specific performance of the whole of a contract, it will

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not interfere to enforce any part of it. And in *The South Wales Railway Company v. Wythes*, 1 K. & J., 186, 24 Law J. Rep., N. S., Ch. 1, Lord Justice Knight Bruce says: "I find no authority for the proposition that where the main body of an agreement is not fit to be performed, or rather the specific performance of which is not fit to be enforced in equity, the subsidiary part of it can or ought to be enforced, particularly when the peculiar nature of that subsidiary part is considered."

This contract remains unexecuted. It is true that the bill alleges that the plaintiffs have done work, and furnished material, to the value of \$40,000 or \$50,000. But the contract, if executed by them, would require from them \$12,000,000 of work and material. The amount already expended, compared with that to be expended, is too inconsiderable to take the case out of the class of executory contracts. It is the settled doctrine of this court that such a contract will not be specifically enforced, unless the remedy is mutual: that is to say, that the covenant of the plaintiff, to be performed on his part, and that of the defendant on his part, must both be of such character that, if either of them shall be delinquent, the court can give relief by compelling its performance specifically by him. 2 Story's Eq. Jr., §§ 711, 723, 790; *Cathcart v. Robinson*, 5 Peters, 264.

I proceed, then, to inquire whether this contract is of such a character that, if the plaintiffs were in default, it could be specifically enforced as against them by a decree of this court.

The covenant on the part of the plaintiffs, although

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expressed in very simple terms, is nevertheless a very grave undertaking. It is, that they will, within such time as the act of Congress requires, build about 360 miles of railroad, and equip and furnish the same complete with rolling stock, depôts, &c., ready for use, furnishing all the materials necessary for this extensive work. Shall this court, in addition to, or rather before, enforcing the covenants of the defendant, undertake to enforce performance on the part of plaintiffs of this covenant of theirs ?

No case is reported, I believe—at least none has been produced on the hearing—in which the court has undertaken to compel a party to build a railroad. In fact, the case of *The South Wales Railway Company v. Wythes*, 1 K. & J., 186, S. C., 5 De G. M. & G., 880, is to the contrary. In this case the court refused specific performance of an agreement for the building of a branch railway, which was entered into during the pendency of a bill before Parliament. See also *The Attorney General v. The Birmingham and Oxford Junction Railway Company*, 3 Macnaughton & G., 453, S. C., 16 Jur., 113, affirming S. C., 15 Jur., 1024, S. C., 7 Eng. L. & Eq., 283 ; *The People v. The Albany and Vermont Railroad Company*, 24 New York, 261.

There are several cases on the subject of building houses and bridges, which, as that subject bears an analogy to that of building railroads, I will now examine.

The first case claiming attention is that of *The City of London v. Nash*, 3 Atk., 512, S. C., 1 Ves. Jr., 12. In this case, Lord Hardwicke decreed, that a covenant in a lease

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to rebuild should be specifically enforced, on the ground that it was essential to the security of the landlord; but, at the same time, he held that a covenant to repair would not be enforced, because compensation in damages could be had at law. This case does not seem to place the jurisdiction of the court to compel the performance of the contract on any ground generally applicable to building contracts.

The next case, in the order of time, is *Errington v. Aynesly*, 2 Brown's Ch., 341, in which Sir Lloyd Kenyon, Master of the Rolls, refused to decree a specific performance of a contract to build, mainly on the ground that if one person would not build, another might be found who would.

In *Lucas v. Comeford*, 3 Brown's Ch., 166, S. C., 1 Ves. Jr., 235, decided very shortly after the above case, Lord Thurlow held the same doctrine, and refused a decree, saying, that the court could not undertake to superintend the construction of a building, any more than it could the repairing of it.

In *Morely v. Virgin*, 3 Ves. Jr., 184, Lord Loughborough refused to decree the performance of a contract to lay out £1000 in a building, because there was not sufficient definiteness in the contract. But he took occasion to say, that there would be a distinction between the case of a covenant to repair, and one to build; and that cases might arise where the contract, being sufficiently specific, might perhaps be enforced. I think that Lord Loughborough, in alluding to Lord Thurlow's decision, did not correctly state the grounds of it; yet it does not seem to me that he intended to overrule

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that decision, or that he said anything which could have such an effect.

In *Fleet v. Branden*, 8 Ves. Jr., 159, the Chancellor refused to decree the specific performance of an agreement to level and fill up a gravel-pit, on the ground that an adequate remedy for a breach of such contract could be had at law.

Thus far it would seem that no case overrules the decision of Lord Thurlow against decreeing specific performance of building contracts. We are now, however, to examine a class of cases which are supposed to establish a contrary doctrine. Before we enter upon their consideration, let us remark certain circumstances which attend them.

1. In each case, the building was to be done upon the land of the person who agreed to do it.

2. The consideration for the agreement, in every instance, was the sale or conveyance of the land on which the building was to be erected; and the plaintiff had already, by such conveyance on his part, executed the contract.

3. In all of them, the building was in some way essential to the use, or contributory to the value, of adjoining land belonging to the plaintiff.

The first of these cases is that of *Storer v. The Great Western Railway Company*, 2 Young & Collyer, 48. The plaintiff had sold to the railway company the right of way through his pleasure-grounds, and the company had agreed, in order that he might have the full use of his adjoining land, that it would make an arched way under its road-bed, large enough for a wagon loaded

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with hay to pass with facility. The court decreed that the arched way should be made. The Vice Chancellor said, that "it was competent for that court to enforce the specific performance of a contract by the defendant to do defined work upon his own property, in the performance of which the plaintiff has a material interest, and one which cannot be compensated in damages."

The next case is that of Price v. The Corporation of Penzance, 4 Hare, 506. In this case, the plaintiff had sold the town some land, and the corporation covenanted to lay out streets, and build houses on it, especially to erect a fish-market. The defendants, without awaiting a decree, built a market. The court, although the relief was not resisted, approved the principle above stated. Wigram, Vice Chancellor, says: "The contract was, that the corporation having purchased the plaintiff's land, should, at their own expense, make a street, and also a market. Under this contract, the corporation have taken possession of the land, and converted it; and having had the benefit of the contract in specie, as far as they are concerned, I need not say that the court will go to any length which it can, to compel them to perform the contract in specie."

In Stuyvesant v. New York City, 11 Paige, 414, the plaintiff, being the owner of a large tract of land in the city of New York, had granted to the city corporation a certain part thereof for the purposes of a public square; and in the conveyance which was executed by the defendant, it covenanted to grade, inclose, and improve the premises in a manner therein provided, the plaintiff having exacted this covenant in order to increase the

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value of the adjoining lands which he retained. After two judgments at law for damages, he brought his bill for specific performance, and Chancellor Walworth decreed in his favor. In the course of his opinion, that distinguished jurist says: "The true rule on the subject of decreeing the specific performance of a covenant in such cases is, that where, from the nature of the relief sought, performance in specie will alone answer the purposes of justice, this court will compel a specific performance, instead of leaving the complainant to a remedy at law, which is wholly inadequate. The court has jurisdiction, therefore, to compel the specific performance by the defendant of a covenant to do certain specified work, or to make certain improvements or erections, upon his own land for the benefit of the complainant, as the owner of the adjoining property, who has an interest in having such work done or such improvements or erections made; and where the injury to the complainant, from the breach of the covenant, is of such a nature as not to be capable of being adequately compensated in damages."

In *Burchett and others v. Boling*, 5 Mumford's Va. R., 442, the partners had entered into a contract to build a hotel on the land of the plaintiff, which he agreed to convey for that purpose, and to receive two shares of the capital stock of the hotel therefor. He conveyed, and removed some buildings from the land, and delivered possession. The other parties commenced erecting the hotel, but afterwards abandoned the enterprise. The court decreed that they should complete the building. All these cases are clearly referable to the principle laid

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down in the case of *Storer v. The Great Western Railway Company*. Judge Story adopted the precise language of the court in that case, without claiming that the principle goes any further. Story's Eq. Jr., § 721 *a*. I think the cases cited rest on a principle clearly distinguishable from that of enforcing building contracts generally, in which parties have contracted, for money or personal property as the consideration, to build on the plaintiff's land; and there is no special reason to render non-performance incapable of being compensated in damages.

In a case reported in 3 Humphrey, Tenn., 657, upon a contract like that in the case last cited, except that it was wholly executory, the court refused to decree specific performance against the party who was to convey the land, although the plaintiffs were ready and willing to perform on their part.

I have thus attempted to analyze all the cases bearing on the subject which have been cited by counsel, or which I have been able to find in the short time I have had for examination; and I do not think that any of them overrule, or are in any manner inconsistent with, the case decided by Lord Thurlow, in 3 Brown's Ch., 166, notes, 1 Ves. Jr., 235. On the contrary, the decrees which have been granted are based upon principles entirely reconcilable with that case. And when we take into consideration the length of time it has stood, during which no decree, resting on the general principle, has been rendered to enforce a building contract, I am inclined to concur fully with Judge Story, that "in cases of contract to build a house or a bridge," or, I will venture to add, a railroad,

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“ a specific performance would not now be decreed.” 2 Story’s Eq. Jr., § 716, note 2.

I have been much pressed by counsel for the plaintiffs with the argument of the distinguished jurist just named, in favor of a general enforcement of this class of contracts. 2 Story Eq. Jr., § 728. But it is evident that the author is there stating not what the rule is, but what he thinks it should be. And I cannot say that I am very strongly impressed by the reasoning with which he supports the abstract propriety of his opinion. It seems to me, that to establish the general doctrine that contracts for building may be specifically enforced in equity, would be to invite into litigation, very many matters which are now generally settled by the parties on a basis much more beneficial to both ; and that it would require the constant supervision of the court, through its officers, in the conduct of affairs it is very poorly adapted to administer. The result of the court’s drawing to itself such a jurisdiction would certainly be far less remedial than the ordinary action for damages.

There is another consideration to be noted in this connection. If the act to be done by the delinquent party, whether the plaintiff or the defendant here, were a single act, to compel which a single decree of the court would be sufficient, a case would be presented very unlike that before us. Years must elapse before this work can be done and paid for. At every step in its progress, the interposition of the court, either by orders in this case, or by decrees in successive cases, may be invoked, if we are at this time to lend the aid of chancery to either of the parties. It is not difficult to foresee the

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mischiefs of such a course. The rule is settled, even in the English Chancery, where the jurisdiction is greatly extended in all such cases, that it will decree specific performance only when it can dispose of the matter by an order capable of being enforced at once; that it will not decree a party to perform a continuous duty extending over a number of years, but will leave the opposite party to his remedy at law. It was on this principle that Lord Hardwicke proceeded in the case of *The City of London v. Nash*, cited above. In answer to the objection to the plaintiffs' having specific performance of the contract, he expressly says: "The objection will not hold, for upon a covenant to build, the plaintiffs are clearly entitled to come into this court for a specific performance—otherwise on a covenant to repair; for to build is one entire single thing, and if not done prevents that security which the city of London has for the rent by virtue of the lease."

And this may have been a reason, and a very strong reason, for the rule, now well settled, that a covenant to repair will not be specifically enforced. *Gervais v. Edwards*, 2 D. & War., 80; *Hill v. Croll*, 2 Phill., 60; *Saunderson v. Cockermouth, &c., Railway Company*, 11 Beavan, 497; *Nickels v. Hancock*, 7 De G. M. & G., 300, 327; *Ogden v. Fossick*, 11 W. R., 128, L. J.

The case cited above of *The South Wales Railway Company v. Wythes*, 1 K. & J., 186, 24 Law J. Rep., N. S., Ch. 1, is in many of its features like that before us now. After some negotiations between the parties, not necessary here to notice, a memorandum was entered into between the company and the defendants as contractors, providing, among other things, that "The company to

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find the land within a reasonable time, and build the stations. The contractors to give a bond to the amount of £50,000 to secure the performance of their contract, and to undertake to execute the works for a double line of railway, and the ballasting and permanent way for a single line, according to the terms of the specification to be prepared by the engineer for the time being of the company, for the sum of £290,000, to be complete ready for opening by the 1st of December, 1855, to be paid in a new stock to be created, bearing £5 per cent. interest from the day of the line being so ready for opening, such interest being derived from the receipts upon the branch line, £60 per cent. of such gross receipts being devoted to such purpose, and an additional £10 per cent. of such receipts, making £70 per cent., on all traffic over the said branch, which shall pass to and from, or beyond Carmathen, or any other more distant place on the main line, the residue of the gross receipts upon the said branch being retained by the company for working the branch; any arrear of the interest of £5 per cent. in one year to be made good out of any surplus in any following year or years until the stock is redeemed.

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Any of the details of this arrangement, in case of difference, to be determined by a referee, to be appointed by the Solicitor General for the time being, on the application of either party, such referee to draw out and settle, on behalf of both parties, the documents necessary to carry it out. The arbitrators, under working clause, to have the power of considering whether the mode of working the Pembroke branch is reasonable,

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having reference to the company's mode of working the branch to Heyland, and if the arbitrators make any award, both parties to abide by it."

A bill was filed to compel the specific performance of this contract by the company against the contractors. To the bill was a general demurrer, which Vice Chancellor Woods sustained, and the case was appealed to the Lord Justices. Lord Justice Knight Bruce, in his judgment, says: "There are several very satisfactory reasons why a specific performance of this agreement should not be enforced in a court of equity, and I will mention some—I do not say all—of those reasons. In the first place, by the agreement, it is provided, in the most vague terms, that the plaintiffs shall find the land—the land, I suppose, for the stations—within a reasonable time, and build the stations; then the contractors are to give a bond for £50,000 to secure the performance of their contract, and they are to execute the works for a double line of railway according to the terms of the specifications to be prepared by the engineer 'for the time being' of the company; then the contract provides for the payment of a sum of £290,000 to the defendants, with interest, in a manner which I assume, for the purposes of the argument, to be intelligible. Skilful, experienced, and honorable as the engineer of this present time, and of the time of the contract, is and was, it is obvious that the engineer of the time when the works may be, if ever, completed, may not be the engineer of to-day, and the engineer of that time might be both incompetent and dishonest. In my opinion, it would not be a proper course for a court of equity to take,

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to force such an agreement on any man or body of men. But, then, it has been said, that a specification has been prepared by the present engineer of the company, Mr Brunel; but that makes no difference. Whether if such specification had been not only prepared, but accepted and approved of by the defendants, that would have made any difference, it is not necessary to say, because there is no such allegation in the bill; the only allegation in the bill being, that the plaintiffs believe that the specification had been approved."

He closes by saying: "I have never known any attempt like the present; and certainly this court will be no party to the entertainment of a suit to enforce so vague, so obscure, so uncertain an agreement, the suit to enforce which has been successfully demurred to; and the suit, being frivolous and utterly vain, will be of course dismissed, and, equally of course, be dismissed with costs."

It will be observed that the infirmity of uncertain and vague stipulations is common to that and this contract, for this line of road remains unlocated, and, according to the usual course of such enterprises, must be subject to changes not possible now to foresee; and in this way differences irreconcilable between the parties, and which this court cannot determine, may, and almost certainly will, arise. So, too, as to the performance of the work, the same difficulties are very likely to occur. Then there is the great consideration of time. Years will be required for the execution of the contract. In the case cited, twenty-two miles of a branch road was to be built. Here is a line of 360 miles stretching out into a new,

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unpopulated, almost unknown region. Other points of similarity might be mentioned. In fact, where the cases differ, it is against the claim of the plaintiff here.

It seems, therefore, that in granting this injunction, which would require that this railroad should be built, equipped, and delivered by one party, and payments made by the other under the control and compulsion of the court, I should be going far beyond any adjudged case, or any principle established by any adjudged case. More than that, I should proceed in the very face of some of the highest authorities, and, in direct opposition thereto, inaugurate a policy without a precedent, involving interests of the greatest consequence to every-day life. The effect of the doctrine, if established, no wisdom can foresee.

Entertaining these views, I must decline to make this advance, and shall overrule the motion for an injunction.

Motion for an injunction overruled.

DISTRICT OF WISCONSIN.

APRIL TERM, 1864.

Before MR JUSTICE MILLER *and* MR DISTRICT JUDGE
A. J. MILLER.

HOWARD *v.* THE LA CROSSE AND MILWAUKIE
RAILROAD COMPANY.

SOUTER *v.* THE SAME.

I. WHEN VALIDITY OF INCORPORATION CANNOT BE QUESTIONED.—

When a party has been impleaded in a bill as a corporation, and, in decrees made in the cause, has been recognized as such, the question cannot be afterwards raised therein, whether the proceedings had in order to its incorporation were regular or effectual.

II. OF DISCHARGE OF RECEIVER IN CHANCERY.—

1. *Security*.—A railroad ninety-five miles long, being a link in an important route, whose gross annual earnings are \$800,000, in good condition, is ample security for mortgage debts thereon amounting to \$2,200,000 ; and a receiver of such road, appointed at the suit of a party on whose debt \$300,000 is offered to be paid, and who has a decree which provides for sale in case of default of payment, as therein provided, will be discharged.

2. *Other remedy*.—A receiver of such road will be discharged, who was appointed on a creditor's bill, showing a judgment for \$16,000, when the plaintiff enjoys all the ordinary remedies for enforcing his lien, and has received only \$1000 for four years, during which the receiver has been in possession of the road.

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3. *Possession reverts.*—A party having, as security for a large debt, a lease of such road, from whom the possession was taken by the receiver, is, upon his discharge, entitled to have possession restored to him.

4. *Right forfeited.*—But a party holding such lease, who has failed to pay sums which he therein stipulated to pay as consideration therefor, and who, by reason of his failure in that behalf, has lost possession, and permitted the property to remain out of his possession for four years, exposed to the hazards of sale, has lost his right of possession.

5. *Decree invalidating judgment.*—An unreversed decree, declaring that the judgment, to secure which such lease was made, was invalid, and setting it aside, will have a persuasive influence towards discharging a receiver appointed, or sought to be retained, for its benefit.

THIS was a motion made by the Milwaukie and Minnesota Railroad Company, for an order discharging a receiver, and transferring to it possession of a certain section of railroad, upon its paying, within a short day, the sums now due upon it.

The railroad which is involved in this matter is ninety-five miles long, and extends from Milwaukie to Portage. It is a part of a railroad built by the La Crosse and Milwaukie Railroad Company. This corporation, having mortgaged the road here involved to Bronson and Souther, as trustees, to secure certain bonds with interest coupons, and default in the payment of the interest having been made, on the 9th of December, 1859, the mortgagees filed their bill of foreclosure in the United States circuit court for Wisconsin.

The Milwaukie and Minnesota Railroad Company, Zebre Howard, Graham and Scott, and Selah Chamberlain were impleaded with the mortgagees.

In 1858, Howard had recovered in the State court of

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Wisconsin a judgment against the mortgagees, which he sued over in the Federal court, where, on the 28th of November, 1859, he had judgment for \$16,379.86. In 1860, he filed his creditor's bill on this judgment, in which suit a receiver was appointed, who, on the 11th of June in that year, took possession of the whole road. On the 6th of July following, the same receiver was extended to the foreclosure suit above mentioned. A decree having been rendered in that cause, appeals were prosecuted to the supreme court, whence it was remitted to the circuit court, with special directions set forth in the mandate, "To enter a decree for all the interest due and secured by the mortgage, with costs; that the court ascertain the amount of moneys in the hands of the receiver or receivers from the earnings of the road covered by the mortgage, which may be applicable to the discharge of the interest, and apply it to the same; and that if the moneys thus applied are not sufficient to discharge the interest due on the 1st day of March, 1864, then to ascertain the balance remaining due at that date, and in case such balance is not paid within one year from the date of the order of the court ascertaining it, then an order shall be entered directing a sale of the mortgaged premises, under the direction of the court; and on bringing the proceeds into court, they shall be applied to the payment of the balance of interest; and if they exceed such balance, shall be applied to the future accruing interest down to the sale; and if they exceed that, to the principal of the bonds, in case the bondholders assent, or *pro rata* to those who may assent; and any remaining balance of the proceeds to be

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invested, under the direction of the court, for the payment of future accruing interest, and ultimately the principal.

“And further, that in case the interest upon the bonds is paid without a sale, the decree shall remain as security for subsequent accruing interest, and ultimately for the principal.

“And further, that the court may pay out of moneys in the hands of the receiver, or out of the proceeds, the taxed costs of the trustees in the proceedings for the foreclosure of the mortgage, not taxed and received from the defendants in those proceedings; and also such counsel fees in behalf of the trustees, as the court, in its discretion, may deem right to allow.”

The La Crosse and Milwaukie Railroad Company made to one Barnes, as trustee, a mortgage, which was subsequent and in terms subject to the mortgage to Bronson and Souter. This mortgage was foreclosed and the road sold, and the Milwaukie and Minnesota Railroad Company became the purchaser. This company was organized under the laws of Wisconsin, with the view of making this purchase, and, in the bill first above mentioned, was impleaded in its corporate capacity, as the successor of the mortgagor, and as the holder of the equity of redemption.

The Milwaukie and Minnesota Railroad Company suffered the bill of Bronson and Souter to be taken as confessed, but two of its stockholders interposed answers, so that the court, in its decree, recognized its corporate existence. And the supreme court gave heed to those answers, and decreed with a view to the matters alleged

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therein, and, of necessity, with a recognition of the company's corporate existence. This company now offered to pay all that the mandate required; that is, "all the interest due and secured by the mortgage," providing the receiver be discharged, and they be placed in possession of the road.

The mortgage debts amounted to \$2,200,000. The road was in good condition, and constituted a part of a direct line of railroad from Milwaukie to the Mississippi. Its gross earnings for the year preceding the application here, as shown by the receiver's reports, were \$800,000. Under the mandate it was the duty of the court to enter a decree for the interest, and, after giving day of payment of the sum to be found due, to direct a sale in case of default therein.

With such a decree entered, which would stand as security for the accruing interest, and the road being of such value, as is shown by the above recited facts, the moving party insisted, that, if they paid at once what was required by the decree to be paid within a year, they should be restored to the possession of their own property. This claim was resisted by the other parties to the suit, upon grounds which the court in its opinion pass upon, and which there fully appear.

Mr Carpenter, for motion.

Mr Cary, *contra*.

MR JUSTICE MILLER.—The first suit above mentioned is a proceeding in chancery, instituted in the district court of the United States for this district while it possessed circuit court powers, to enforce a judgment lien

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on the road of the La Crosse and Milwaukee Railroad Company. It was commenced in 1860, and on the 11th day of June, in that year, a receiver was appointed, who took charge of the whole road and all its appurtenances. Prior to this, on the 9th day of December, 1859, the plaintiffs in the second suit, who were trustees of a mortgage to secure \$1,000,000, covering the eastern end of the road from Milwaukee to Portage, had brought their suit in the same court to foreclose their mortgage; and on the 6th day of July, 1860, on their motion, the same person was appointed receiver of this part of the road, who had been previously appointed receiver of the whole road in the Howard suit. The amount of Howard's judgment is about \$20,000, and is conceded to be subordinate in its lien to the mortgage of Bronson and Souter.

The district court rendered a decree in favor of Bronson and Souter for half the amount of the debt secured by their mortgage, and ordered a sale and foreclosure. From this decree the trustees appealed to the supreme court. That court, at its recent term, reversed that decree, holding that the plaintiffs were entitled to the full amount of the bonds secured by the mortgage, with the accruing interest. The mandate of the supreme court, which is now before us here, directs us to ascertain the amount of interest due on these bonds on the 1st day of March last, after deducting such sums as may be in the hands of the receiver applicable to that purpose; and that, if that sum, with the accruing interest and costs, is not paid within twelve months from the date of the order ascertaining the amount, then the road is to be sold.

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The Milwaukie and Minnesota Railroad Company now comes forward, and proposes to pay this sum within a short time to be fixed by the court, say twenty or thirty days, and asks an order directing that, upon such payment, the receiver be discharged, and that he deliver to said company the railroad from Milwaukie to Portage, with the rolling stock and other appurtenances properly belonging to it. A similar order is asked in the Howard suit. •

The granting of this order is resisted by Souter, the surviving trustee, Howard, and Selah Chamberlain; and it is very obvious that, if the plaintiffs are paid all that is due them on their mortgage, the order appointing a receiver in the suit should be discharged, unless some very stringent reason exists for its continuance.

The first inquiry, in this view of the case, is concerning the claim of the Milwaukie and Minnesota Railroad Company. The La Crosse and Milwaukie Railroad Company, which built the road, and which gave the mortgage to Bronson and Souter, afterwards made a mortgage to William Barnes. This mortgage was foreclosed by a proceeding prescribed by the statutes of Wisconsin; and the purchasers at the sale organized themselves, under the laws of that State, into the corporation now setting up this claim. By virtue of that sale and foreclosure, this company became the successors in interest of the La Crosse and Milwaukie Railroad Company. In it rests, subject to the incumbrance, the legal title to the road, appurtenances, and franchises of which it asks possession.

An attempt is made, on this motion, to question the

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regularity of the proceedings by which this company was incorporated, and the fairness of its purchase.

The first objection is altogether inadmissible, because this corporation was made a defendant to the foreclosure suit by the plaintiffs, and has been recognized by them, and by this court, and by the supreme court of the United States, as an existing corporation. It is certainly too late, for any purpose of this suit, on a motion of this kind, to question its legal existence. •

Nor can the second objection be entertained. The supreme court of the United States, in the case wherein we are now considering its mandate, has passed upon the very question. It has decided that the Milwaukie and Minnesota Railroad Company has become the owner of the road, and that, by virtue of the foreclosure proceedings under the Barnes mortgage, all liens subsequent in date to that incumbrance, including the claim of Howard, were cut off and for ever barred.

The language of the supreme court is this: "Now, it appears that each of these judgments was recovered after the date of the third mortgage of the La Crosse and Milwaukie Company, upon the foreclosure of which the Milwaukie and Minnesota Company was formed. The liens of these judgments were subsequent to this mortgage, and were cut off by its foreclosure. Indeed, the judgment of Howard, of November, 1858, and the last judgment of Graham and Scott, which was recovered in 1860, never were liens upon any interest in the road of the La Crosse and Milwaukie Company, the defendants in the judgments, as the equity of redemption had already passed to the purchaser, under the sale to Barnes

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in the foreclosure of the third mortgage, and afterwards became vested in the Milwaukie and Minnesota Company. These judgment creditors, therefore, according to their answers, have no interest in the subject matter of this litigation."

This opinion was rendered in a proceeding to which all who oppose the present motion, except the Milwaukie and St Paul Railroad Company, were parties; and that company acquired any interest it may have in the property now under consideration, *pendente lite*. In the case of *Russell v. Ely*, 2 Black's R., 575, the supreme court has decided that the mortgagee of real estate does not acquire the legal title to the mortgaged premises, nor the right of possession, except by the consent of the owner, and that the holder of the legal title may maintain ejectment against the mortgagee in possession. It cannot, then, be controverted in this proceeding, and so far as the parties to this suit are concerned, that the Milwaukie and Minnesota Railroad Company is the legal owner of the property of which it asks possession.

I next proceed to examine the objections raised by each of the parties I have mentioned to the discharge of the receiver, and to placing the road in the possession of that company.

The plaintiffs generally urge, as their first ground of objection, that the road itself and its appurtenances are not a sufficient security for their debts; and that during the year which is given by the supreme court for the payment of the arrears of interest, they should be retained in the hands of the receiver, in order that the

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accruing revenue may be applied thereto. The property on which the plaintiffs' mortgage is a lien consists of a road-bed ninety-five miles in length, extending from Milwaukee to Portage, together with the depôts, rolling stock, and other appurtenances connected therewith. It constitutes a part of a direct line of road from the former city to the Mississippi river, and is a link in one of the most valuable routes, both present and prospective, in the United States. The gross annual earnings from this ninety-five miles of road for the past year, as shown by the reports of the receiver, which are before us, are about \$800,000. It is in good condition, and there is no reason to believe, that when it is transferred from the control of a receiver to that of the real owner, its value or its receipts will be diminished. There are two mortgages on which the interest is all paid, prior to that of these plaintiffs. Their aggregate amount, together with the plaintiffs' mortgage, is about \$2,200,000. The road must be worth this sum, and is ample security for the plaintiffs' debt. If we consider the amount of the gross receipts just stated, the fact that the party now asking possession, in order to obtain it, proposes to pay some \$300,000 or \$400,000 of the plaintiffs' demand, and that the decree which we are to render must stand as security for his further claim, on which he can have an order of sale for any instalment of interest, if unpaid when it becomes due, it would seem to be the merest pretence that, after the payment of the sum awarded to him, his security requires the longer continuance of a receiver. With the accrued interest paid in full, with ample security for the remainder of his debt, and with

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speedy and sure means of enforcing its payment in case default be made therein, there can be no reason why he should longer retain the property from the control of its owner.

With regard to Howard, I have already shown that the supreme court has decided that he has no further interest in the property. It is said that its opinion was delivered under a mistake of fact. It may have been, and in a proper proceeding in his case it might be found that he has a valid subsisting lien; but, on this motion, I must consider the presumption to be the other way, and act accordingly. But suppose it be conceded that his lien is valid. It amounted, when his suit was brought, to less than \$20,000. Shall this road, with annual receipts to the amount of \$800,000, be retained in a receiver's hands, for this comparatively inconsiderable sum, when the creditor possesses all ordinary remedies for enforcing his claim? Is there no means of enforcing a lien or collecting a debt but through a receiver? Howard has now had his receiver for four years; and has received but \$1000, and has taken no steps in his cause since the order affording him this extraordinary remedy. And during all this period he has been asserting a lien, the validity of which, at the best, is extremely doubtful. It surely cannot be necessary, under such circumstances, to argue against persevering in that mode of enforcing the judgment.

Mr Chamberlain objects to the property's being turned over to the moving party here, and insists that possession should be restored to him. He asserts that he has a judgment for over \$700,000, which is a lien upon the

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road; and that, when the receiver was appointed, he was in possession under a lease, which was executed to him as security for his debt. If these representations were true, and his lease unimpeached, or his debt conceded to be just, I should have no hesitation, upon discharging the receiver, in replacing the property where the court, when it made the appointment, found it. And as the matter is now presented to me, moreover, I am constrained to say that Mr Chamberlain's objection to the discharge of the receiver is the only one which has deserved a moment's consideration. It is not true, however, that Mr Chamberlain was in possession when the receiver was appointed. The terms of his lease required him, out of the proceeds of the road, to keep down the interest upon the mortgage debt of the plaintiff in this suit. This he failed to do, and, either voluntarily, or upon necessity, some fourteen or fifteen days before the first order appointing a receiver, he had surrendered possession of the property to the plaintiff. This fact is conceded by all parties, and is distinctly proved by Mr Dow in the principal suit, and shown by the accounts returned into this court in that case. When the receiver was first appointed, therefore, the property was taken by the court from these plaintiffs, and not from Mr Chamberlain. Again, it appears that through his failure to keep down the interest on the mortgages, and by parting with the possession, Mr Chamberlain abandoned his claim under the lease, and can no longer insist on the right to hold possession of the property as his security. I must confess, that, upon examining the lease in the light of this conceded fact, it is by no means clear to me

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that, if Mr Chamberlain were to bring his action to recover possession, he should be successful. The consideration, or the main consideration, has failed. At all events, after permitting the property, for four years, to be kept both from him and from its owners, and subjected to all the hazards of sale and loss, it would seem that his right to its possession must have terminated. Nor can I, in an application like this, addressed in some sense to the discretion of the court, shut my eyes to the fact that Mr Chamberlain's judgment, which was for the debt secured by the lease, stands upon a very doubtful basis as to its validity and justice. It is certainly true that, by a decree which is in full force, it has been set aside and vacated.

And although I do not propose here to determine whether that decree can be used by the La Crosse and Milwaukie Company, or by its successors, the Milwaukie and Minnesota Company, yet it certainly must have a persuasive influence in determining whether a receiver should be continued for the benefit of that judgment, or whether, if he is discharged, the possession should be remitted to Mr Chamberlain.

When I add to these considerations, as in my opinion the fact is, that there is sufficient security for any lien Mr Chamberlain may have on the road; that the courts are open for him to enforce it; and that, although a party to all the suits concerning this road, he has never thus far, either by original or cross bill, set up a claim to any relief; I do not think his objections are sufficient to induce us to continue the receiver, or to award to him .

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the possession of the property upon the receiver's being discharged.

By reason of a disagreement between Mr Justice Miller and Mr District Judge Andrew J. Miller upon the subject matter of the motion, the application was, notwithstanding the above opinion, overruled.

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DISTRICT OF IOWA.

MAY TERM, 1864.

Before MR JUSTICE MILLER and MR DISTRICT JUDGE
LOVE.

GRAY v. CHICAGO, IOWA AND NEBRASKA
RAILROAD COMPANY.

I. PROCEEDINGS TO PUNISH CONTEMPT.—

1. *By motion to commit.*—The proper practice to punish for contempt in violating an injunction, is by motion to commit, upon proper notice to the parties proceeded against.

2. *Notice necessary.*—The rule requiring notice is salutary, and will not be relaxed by this court.

3. *Order granted without notice discharged.*—An order of arrest issued without such notice will be discharged on motion.

II. INJUNCTIONS IN VACATION, AND WHEN THEY EXPIRE.—

1. *Solely statutory.*—In courts exercising equitable jurisdiction, injunctions are allowed by the judge in vacation solely under the authority of a statute.

2. *By district judge.*—An injunction allowed by a district judge, by virtue of the power conferred upon him by the act of February 13, 1807 (2 Statutes at large, 418), expires at the commencement of the term next succeeding its allowance.

3. *The 55th rule in equity* does not remove the limitation.

(1.) *Argu.*—The terms of the rule, rightly construed, do not remove the limitation.

(2.) *Argu.*—If they did, as the rule would then operate a repeal of the statute, it would be in excess of the authority of the court to establish it.

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4. *The judges of the supreme court* have power to grant injunctions in vacation, which do not expire with the vacation.

THIS was a bill in chancery, filed to enjoin the defendant from erecting a bridge across the Mississippi river at Clinton, Iowa.

The plaintiff, during the summer vacation, procured from the district judge an order allowing the injunction as prayed for. The writ was accordingly issued, and was duly served upon the officers of the defendants, previous to the October term of the court. At that term, no orders or other proceedings were had in the case.

Since that term, the defendants having proceeded with their enterprise, notwithstanding the command of the writ, the plaintiff, without notice to any other party concerned, presented in the vacation, to the district judge, an affidavit showing a violation of the injunction, and procured from him an order directing the clerk to issue a writ of attachment for the arrest of the persons guilty of the alleged disobedience, with bail for their appearance at the next term, and requiring them to answer for their contempt at that time.

The parties arrested now moved to discharge the attachment, on the ground that it was irregularly issued.

Mr Nourse, for the motion.

Mr Grant, contra.

MR JUSTICE MILLER.—The proper and regular course for proceeding against persons who are alleged to have com-

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mitted a contempt of the court in disobeying the command of a writ of injunction, is by motion to commit. The party proceeded against must have due and reasonable notice of this motion before it should be granted. An opportunity to be heard must be given before the party can be deprived of his liberty. In these two particulars these proceedings were irregular: *First*, That no formal hearing of the charge and the answer thereto, upon motion duly made, was had; and *Secondly*, No notice of the application was given to the parties charged.

The charge of a deliberate and intentional violation of a writ of injunction, duly served, is a very grave one. It is within the power of the court to punish a party found guilty of such an offence with imprisonment; a circumstance which does not diminish the gravity of the charge.

The rule which requires notice to the party charged, of proceedings which may result in such serious consequences, is salutary. It will not be relaxed by this court.

This rule has been violated here, and the order was unauthorized. The motion is sustained, and the prisoners will be discharged.

The plaintiff, upon an affidavit showing a violation of the injunction by the persons there charged, moved that they be committed.

Mr Grant, for the motion.

Mr Nourse and *Mr Witherom*, *contra*.

MR JUSTICE MILLER.—Under the course of practice in the English Chancery, a writ of injunction could not

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formerly issue, except upon an order of the court in term. But inasmuch as, to be of any avail, the writ is often required to be issued speedily, and the various courts in the United States exercising chancery jurisdiction are generally in session only a part of the year, at regular terms, and have corresponding vacations, it was found necessary to remedy by legislation the evils thus arising. Accordingly all the States of the Union have statutes providing that the judges, and, in some instances, other officers, may allow the writ in vacation. It is by virtue of these statutes that all writs of injunction which are allowed during vacation are issued.

The act of Congress, which is almost coeval with our Federal judiciary, authorized the justices of the supreme court, in proper cases, to allow such writs in vacation.

The district judges, although as fully judges of the circuit courts as the justices of the supreme court, had no power to grant writs of injunction out of term, until the act of Congress, approved February 13, 1807. 2 Statutes at large, 418. This act, however, imposed two limitations upon their exercise of this power. One was in any case where a party had had a reasonable time to apply to the circuit court for the writ; the other declared that the injunction thus granted should expire at the commencement of the next term of the circuit court succeeding its allowance, unless continued in force by an order of the court.

As no such order was made in the present case, at the last term of this court, it is obvious that no injunction was in existence when these parties are charged to have

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violated it, unless its continuance can be shown otherwise than by the statute just referred to.

The plaintiff's counsel claims that the 55th equity rule furnishes such authority. That rule, after prescribing some of the circumstances required as pre-requisites to granting injunctions, says: "In every case where an injunction, either the common injunction or a special injunction, is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the court."

It is argued that as no order of the court to dissolve such an injunction can be had until the next term after it is granted, the last clause can have no meaning unless it be, that the injunction must remain until dissolved either by order of the court or by the judge who granted it. And the author of the treatise referred to (Conkling's Treatise, 218) proposes to read "and" for "or" in support of this view.

This, however, only transfers the difficulty to the other member of the sentence, and renders the words "until the next term of this court" useless; for, if the injunction is to continue, at all events until dissolved by order of the court, there is manifestly no sense in saying that it shall continue until the court sits.

There is a still more serious objection to this construction of the rule, namely, that it would amount to a repeal of the statute. Were it necessary to decide the point, we should feel bound to hold that, notwithstanding the liberal provisions of the act of 1842, under which these rules were framed by the supreme court, that court

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derived from them no authority to make any rule which would conflict with an act of Congress. *Ward v. Chamberlain*, 2 Black's R., 430.

But the necessity of deciding this point does not arise here. By a reference to the two acts of Congress already cited, conferring on the judges of the supreme court, and of the district courts respectively, the power to grant injunctions, the sentence may be relieved of its apparent incongruity.

The justices of the supreme court have power to grant injunctions which do not expire by the commencement of the next succeeding term. To injunctions thus granted, the latter part of the rule applies, namely, that they continue until dissolved by some other order of the court.

To injunctions granted by the judges of the district courts, the other alternative of the disjunctive sentence applies, merely reiterating the provision of the statute, that they continue only until the next term of the court, unless otherwise ordered by the court. Thus, when we suppose the framer of the rule to have had the statutory provisions in his mind (and no other supposition can be indulged), and that the rule was made in view of it, instead of to repeal it, the sentence becomes intelligible and harmonious in its own members and with the acts of Congress.

We are therefore of opinion, that there was no injunction in existence at the time the acts which are alleged to have violated it were performed.

The motion to commit must be overruled. .

Motion overruled.

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As to the extent of the power of the supreme court to prescribe rules, and their force in connection with provisions in the statutes, see *Burr v. Haughton*, 9 Peters, 360, commented on and distinguished in *Ward v. Chamberlain*, cited in the text; *The St Lawrence*, 1 Black, 522; *Scott v. "The Young America,"* 1 Newb., 107; *Keary v. Farmers', &c., Bank*, 16 Peters, 89; *Massingell v. Downs*, 7 How., 760.

And as to the control of the circuit court over its own practice—

1. When a rule has been prescribed by the supreme court, see *The Bank of the United States v. White*, 8 Peters, 262.

2. When such rule would work an injustice, *Poultney v. The City of Lafayette*, 12 Peters, 472.

3. When supreme court has prescribed no rule, *Burr v. Haughton*, 9 Peters, 329; *Philadelphia and Trenton R. R. Co. v. Stimpson*, 14 Peters, 448; *Fulerton v. Bank of U. S.*, 1 Peters, 604, 612.

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DURANT v. IOWA COUNTY.

I. COUPONS NO PART OF PRINCIPAL DEBT.—

1. *Coupons attached to bonds*, providing for the yearly interest on the sum named in the bond, do not form part of the principal debt.

2. *The five per centum valuation*, mentioned in section 3, article xi., of the Iowa constitution, does not include such coupons.

II. EFFECT OF SUITS AND DECREES ON HOLDERS OF BONDS.—

1. *Bonds and the coupons attached*, issued by counties, payable to bearer, possess all the qualities of commercial paper.

2. *The pendency of a suit* to restrain the transfer of such securities, and a decree in such suit that they be delivered up to be cancelled, are inoperative as respects a *bona fide* holder for value.

3. *But if he have actual knowledge* of proceedings when he becomes the owner and holder, he is concluded by them.

THE defendant subscribed for stock in the Mississippi and Missouri River Railroad Company, and in payment therefor issued its bonds with coupons attached

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for the yearly interest. This action was brought upon certain overdue coupons, by the plaintiff, as the bearer thereof. At the time the bonds were issued, the constitution of the State of Iowa contained the following provision :

“ Article XI.—Miscellaneous.

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“ Sec. 3.—No county, or other political or municipal corporation, shall be allowed to become indebted in any manner, or for any purpose, to an amount in the aggregate exceeding 5 per centum on the value of the taxable property within such county or corporation, to be ascertained by the last state and county tax lists, previous to the incurring of such indebtedness.”

The defendant pleaded two special pleas to the plaintiff's declaration. In the first, it was averred that the whole amount of the bonds issued by the county, together with the interest which had accrued thereon and remained unpaid, exceeded, at the time of bringing this suit, 5 per centum of the value of the taxable property within the county.

In the second plea, it was averred that the county had instituted a suit in equity in the State court against a former holder of the bonds to which the coupons here sued on were attached, alleging that they were issued without authority of law and fraudulently, and praying that he might be enjoined from selling, negotiating, or suing upon them, and might be decreed to deliver them up to be cancelled ; that he appeared to the suit, and that such proceedings were had thereon, that a decree

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was rendered declaring the bonds void, perpetually enjoining the defendant from selling, negotiating, or suing on them, and decreeing that he deliver the same up to be cancelled; and the plea further averred, that at the time that suit was commenced, and also during its pendency, and at the time the decree was rendered, the coupons here sued on belonged to the former holder, and afterwards came to this plaintiff.

To each of these pleas there was a demurrer.

Mr Edmunds, for the plaintiff.

Mr Templin, for the defendant.

MR JUSTICE MILLER.—The demurrer to the first plea must be sustained. The real debt incurred by the county was the principal sum named in the bonds. The coupons attached to the bonds were promises to pay the annual instalments of interest. Their form, and the fact that they might be detached from the principal obligation, do not change their character. They do not form part of the debt, any more than would a provision for interest yet to accrue incorporated in the body of the bond. If the defendant's counsel were correct in his position, the bonds when issued were legal, because it is not pretended that the amount secured by them exceeded the 5 per centum of the value of the taxable property in the county; but by lapse of time, as the interest has come due and remained unpaid, they and their incidents, the coupons, have become illegal. The absurdity is manifest.

The section of the constitution relied on, by its terms refers us to the time when the bonds were issued, to determine whether their amount exceeds the limit pre-

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scribed in it. There is no pretence for saying that the interest thereafter to accrue was a debt within the meaning of the section.

The demurrer to the second plea presents a question of more difficulty. Were it of the first impression, I should incline to sustain the plea. Considerations which appear to me just support that view. But the authorities are the other way, and I feel constrained to submit to them.

It must now be considered as settled, that bonds and coupons of the character now under consideration, possess all the qualities of commercial paper. They pass by delivery; the holder of them has a full title; and the county cannot set up against one who has taken them in good faith equities which might be available against the original payee, providing they were not utterly void in their inception. *Moran v. The Commissioners of Miami County*, 2 Black, 722; *Mercer County v. Hackett*, 1 Wallace, 83; *Gelpeke v. Dubuque*, 1 Wallace, 176, 206; *Murry v. Landner*, 2 Wallace, 110.

The question of the effect upon commercial paper of judicial proceedings has most frequently arisen in cases of garnishment, by which process the maker of such paper has been sought to be held for some debt of the payee. The general current, and decidedly the weight of authority, is in favor of the doctrine that such process is inoperative, in respect of such paper. Thus in *Kieffer v. Ehler*, 18 Penn. St., 6 Harris, 388, Lowrie, J., speaking for the court, says, that such securities "have a legal quality which renders the hold of an attachment upon them very uncertain. Unlike all other property, they carry their whole evidence on their face, and the law

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assumes the right of him who obtains them, for a valuable consideration, by regular indorsement, and without actual notice of any adverse claim, or of such suspicious circumstances as would lead to inquiry. . . . It has always been held, that an attachment is unavailable against a *bona fide* holder, for value, of negotiable paper, who obtained it after attachment, without notice and before maturity." See also *Winston v. Westfeldt*, 22 Alabama, 760; and *Drake on Attachments*, § 577 *et seq.*, where many cases are cited.

The principle on which these cases proceed is equally applicable to cases in equity, when the same object is sought by means of an injunction and decree.

In *Murry v. Lylburn*, 2 Johnson's Ch., 444, Chancellor Kent holds, that a *lis pendens* is notice, to an assignee of a bond and mortgage, of a latent equity in a third person; but at the same time expresses the opinion, that "the safety of commercial paper would require the limitation of the rule," so far as not to extend to commercial paper not due. And in *Stone v. Elliott*, 11 Ohio State, 252, the question came up in precisely the form it does here. A bill in chancery had been filed by judgment creditors of the holder of the note, and before its transfer a decree was had against the maker, to compel its payment to the complainants; and yet that decree was held to be no defence to an action brought by a subsequent *bona fide* holder, without notice and for value. In a well-considered opinion, it was held, that the doctrine of *lis pendens* did not apply to negotiable paper before due.

It is insisted that, in this view, proceedings to enjoin the transfer of such securities are futile. Not so. An

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injunction will prevent the transfer of the securities during the pendency of the suit, and a decree that they be delivered up to be cancelled, if enforced at once, will protect the parties. A neglect to take out an injunction, or to enforce such a decree, is the fault of the plaintiff, not of the law.

The demurrer to the second plea must be sustained.

The defendant, at a subsequent day in the term, amended its second plea, by alleging that the plaintiff had, at the time he became the owner and holder of the coupons sued on, full knowledge of the proceedings in the suit in equity.

To this amended plea the plaintiff demurred.

MR JUSTICE MILLER.—The effect of the plea is to charge the plaintiff with actual knowledge of the pendency of the suit to avoid the bonds and coupons. He then purchased with notice of the rights of the defendant. He is not an innocent and *bona fide* purchaser of the paper, and is entitled to no protection as such. He can occupy no better position than his vendor or indorser.

The plea as amended is good, and the demurrer must be overruled.

Demurrer overruled.

The United States *v.* Gleason.

THE UNITED STATES *v.* GLEASON.

I. KILLING OF ENROLLING OFFICER UNDER THE ACT OF FEBRUARY 24, 1864 (13 U. S. Statutes at large, 8).

1. *When murder within the act.*—If an officer, while engaged in the proper discharge of his official duties, have occasion to deal with a man who, under the influence either of a general feeling of hostility to the law, or of a violent temper, which is roused by no fault of the officer, or of a spirit of revenge, makes an assault which results in the death of the officer, a purpose in his mind to obstruct the execution of the law, is not necessary to constitute the offence a crime under the act.

2. *When not.*—But, on the other hand, if the officer should be employed in the discharge of such of his duties as did not bring him in collision with others, as when going through the country serving notices of a draft, and should become involved in a quarrel upon some matter having no connection with his official duties, but growing out of some personal difficulty of his own, and should be assaulted and killed, the author of the homicide would not be amenable to this act.

(1.) *Argu.*—The object of this law was to prevent obstruction to its execution.

(2.) *Argu.*—If it seek to draw to the Federal jurisdiction offences against the person of a Federal officer, simply on the ground that he is such officer, the act may be unconstitutional.

II. INDICTMENT UNDER THE ACT—

1. *Must contain averment of animus.*—As it must be shown in proof that the *animus* of the assault was roused by the officer's discharge of his duties, the indictment must contain an averment to that effect.

THIS was a demurrer to an indictment.

The facts sufficiently appear in the opinion.

Mr Severe, in support of the demurrer.

Mr Baldwin, district attorney, *contra*.

MR JUSTICE MILLER.—This is an indictment for murder

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under the 12th section of the act of February 24, 1864 (13 Statutes at large, 8), which provides :

“ That any person who shall forcibly resist or oppose any enrolment, or who shall incite, counsel, encourage, or who shall conspire or confederate with any other person or persons forcibly to resist or oppose any such enrolment, or who shall aid or assist, or take any part in any forcible resistance or opposition thereto, or who shall assault, obstruct, hinder, impede, or threaten any officer or other person employed in making, or in aiding to make such enrolment, or employed in the performance, or in aiding in the performance, of any service in any way relating thereto, or in arresting, or aiding to arrest, any spy or deserter from the military service of the United States, shall, upon conviction thereof, in any court competent to try the offence, be punished by a fine not exceeding \$5000, or by imprisonment not exceeding five years, or by both of said punishments, in the discretion of the court. And in cases where such assaulting, obstructing, hindering, or impeding shall produce the death of such officer or other person, the offender shall be deemed guilty of murder, and upon conviction thereof, upon indictment in the circuit court of the United States for the district within which the offence was committed, shall be punished with death. And nothing in this section contained shall be construed to relieve the party offending from liability, under proper indictment or process, for any crime against the laws of a State, committed by him while violating the provisions of this section.”

The indictment alleges, that the persons killed were

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enrolling officers, and were, at the time of the commission of the offence, employed or engaged in and about the duties of said enrolment; that while so engaged they were assaulted by the defendant, and wounded; and that the wounds so received resulted in death.

To this indictment there is a demurrer. Among many other grounds alleged therefor, it is insisted that it is a fatal objection to the indictment, that it contains no allegation that the assault was made with the *intent* to hinder, delay, obstruct, or oppose in any manner, the execution of the duties in which the officers were engaged.

We are not prepared to hold that such intent is in all cases essential to an offence under this statute.

If an officer, while engaged in the proper discharge of his official duties, have occasion to deal with a man who, under the influence of a general feeling of hostility to the law, or of a violent temper, which is roused by no fault of the officer, or of a spirit of revenge, makes an assault which results in the death of the officer, a purpose in his mind to obstruct the execution of the law, is not necessary to constitute the offence a crime under the act.

But, on the other hand, if the officer should be employed in the discharge of such of his duties as did not bring him in collision with others, as when going through the country serving notices of a draft, and should become involved in a quarrel upon some matter having no connection with his official duties, but growing out of some personal difficulty of his own, and should be assaulted and killed, the author of the homicide would not be amenable to this act.

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Offences against persons exercising these offices, and discharging the duties thereby imposed, must be punished ; but if the offences are committed against them, not as officers, but in personal difficulties totally disconnected with their official duties, in which they may be right or wrong, and in which they may give or receive injuries, the guilt or innocence of the parties with whom they come in conflict must be otherwise determined than by the act before us.

The object of that act was to prevent obstructions to the enforcement of the enrolment law, and to protect officers engaged in that enforcement from violence growing out of and connected with the performance of their duty. It was not intended to draw to the jurisdiction of the Federal courts all offences of which such officers might be the objects.

Indeed, it may be doubted whether Congress has the constitutional power thus to withdraw from the jurisdiction of the State tribunals the cognizance of such offences, solely upon the ground that the party injured is an officer of the Federal government, and at the time was employed in a general way in discharging the functions of his office. The true principle seems to be, that it must appear that the *animus* of the assault grew out of, or had some relation to, the discharge by the officer of his official duties. And if this is necessary to appear in proof, it is equally necessary that some averment of it should be made in the indictment. Nothing of the kind is found here. It is perfectly consistent with all that is alleged in the indictment, and perhaps a fair inference from it, that while the deceased was an enrolling officer,

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and engaged as such in the discharge of the regular duties of his office, the assault which resulted in his death had no connection whatever with those duties.

The demurrer is therefore sustained.

At the request of the district attorney, the prisoner was retained in custody, to await the action of the grand jury, then in session, which found a new bill.

See *post* 115.

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DISTRICT OF WISCONSIN.

APRIL TERM, 1865.

Before Mr JUSTICE MILLER and Mr DISTRICT JUDGE
A. J. MILLER.

SOUTER v. LA CROSSE RAILROAD.

- I. NO ORDER NECESSARY TO LIMIT THE TIME WITHIN WHICH A FINAL DECREE SHALL BE PERFORMED.—
 1. *The practice in the courts of equity* of the United States, does not require that an order be made, limiting the time within which the decree rendered in the cause shall be performed, before a party may be proceeded against, for non-performance of its directions.
- II. RESIDENT SURETIES NOT REQUIRED IN FEDERAL COURTS.—When litigants in the Federal courts are required to give security, their sureties need not be residents of the State in which the suit is pending.
- III. POSSESSION BEFORE FORECLOSURE.—Owners of the equity of redemption are entitled to possession until foreclosure.
- IV. NO SUPERSEDEAS BOND GIVEN.—If the unsuccessful party to a decree does not give a *supersedeas* bond, he cannot complain if the decree be enforced, notwithstanding any injury to which he may be thereby subjected.

THIS was a motion to attach the officers of the Milwaukee and St Paul Railway Company, for disobedience of the order of the court in respect of the delivery of certain property therein mentioned. The facts fully appear in the opinion of Mr Justice Miller.

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MR JUSTICE MILLER.—The motion before us is for an attachment for contempt, against the president and directors of the Milwaukie and St Paul Railway Company, for refusing to deliver the rolling stock mentioned in the order of this court of July 18, 1865.

To enable us to understand the merits of the motion, it is necessary to recount the proceedings on which that order was founded.

At the April term of this court, 1864, the mandate of the supreme court was filed in this case, directing a decree in favor of plaintiffs, for the full amount of their bonds and interest, less whatever sum might be in the hands of the receiver, with provision for one year's time for the defendant to pay the remaining amount. If this sum was not then paid, a sale of the road and its appurtenances was directed.

The Minnesota Railroad Company, which owned the equity of redemption, thereupon offered to pay into court the sum due the plaintiffs, on condition that the receiver should be discharged, and the road and all its rolling stock be placed in its possession. A motion to this effect was made, and was resisted by many parties; among others, by the Milwaukie and St Paul Railway Company, which had the actual possession of the road and rolling stock. The judges of this court being divided in opinion on that motion, it was overruled; and the cause was carried to the supreme court on other matters involved in the final decree.

Pending that appeal, the Minnesota Company filed a bill in this court against the St Paul Company, setting forth its own title to the rolling stock in question, under

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certain orders and decrees of this court, and the claim of the latter company thereto ; and praying that its title might be established, and the possession delivered.

There was a demurrer to this bill, and on a hearing, the judges of this court were again divided in opinion, and the bill was dismissed.

An appeal was taken from this decree also.

Both these appeals came on to be heard in the supreme court at the same time ; and that court held, in the latter suit, that the proceedings in chancery, under which the St Paul Company claimed the rolling stock, conferred no right of possession ; and that, upon the allegations of the bill, the Minnesota Company was entitled to the relief prayed. As the case had been decided on demurrer, it was sent back with leave to the St Paul Company to answer. This they have done, and that case is now at issue.

In the other case, the supreme court reversed the order overruling the motion of the Minnesota Company, and sent down its mandate directing that an order be entered, discharging the receiver, and letting the Minnesota Company into possession, if, within a time to be fixed by the court, it should pay all that was due on the mortgage, to foreclose which the suit was brought.

On the 18th of July last, the order was made by this court according to the directions of the mandate.

On the 1st of January last, the Minnesota Company paid the full amount, interest, and costs that was then due on said mortgage ; and demanded of the receiver and of the St Paul Company, that they should deliver posses-

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sion of all the property which the order of the court called for.

The receiver delivered the road and all the stock that was in his possession. The St Paul Company delivered a part of the rolling stock,—all, as they claim, that was necessary to enable the Minnesota Company to work their road profitably,—but refused to fully obey the order of the court by the delivery of all the property. An attachment is now asked in order to the punishment for contempt in this disobedience.

A part of this rolling stock had been purchased by the receiver, and was conceded to belong to the Minnesota Company and to the St Paul Company, in certain proportions which had been fixed by the court. But these proportions had reference to the entire value of such stock, and no partition thereof had been made. The respondents in this motion have delivered very nearly that proportion, in value, to which the Minnesota Company is entitled; and have accepted a proposition made by the receiver, to appoint two competent persons to make a complete division, by whose action they profess a willingness to abide. I do not think any order of this court authorizes the receiver solely to enter upon or to execute any such arrangement; nor do I think the respondents are in contempt in respect of their action here complained of.

As to the remainder of the stock not delivered, they set up several grounds of justification for their refusal.

One of these is, that according to the English Chancery practice, another order in addition to the main decree is necessary, fixing a time within which the decree must

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be performed, before a party can be in contempt for non-performance.

However this may be in the English Chancery, which is always in session, and can always issue such orders on short notice, I am satisfied that, in our practice, where the courts hold stated terms of short duration, and where the intervening vacations are very long, such a rule is inapplicable. If the English practice were to obtain here, the execution of many orders of the court would be delayed until they became useless, and yet no punishment attach. Besides, in this case, the time became fixed with sufficient definiteness by the payment of the money to the clerk; and the very fact that the respondents partly obeyed the order, shows that they labored under no difficulty because the order, which they here insist upon, was not made.

It is said that certain bonds, taken to meet the requirements of the court before the property should be delivered into the custody of the Minnesota Company, were not sufficient.

The order of the court provides that these bonds should be approved by the clerk. He has approved them.

It is objected that the sureties live in other states. This objection can have no force in the Federal courts. It would be great injustice to require parties, who, in order to litigate in the Federal courts, must generally be non-residents, to give resident sureties in large sums. The discretion confided to the clerk, I am satisfied, was well exercised. Moreover, as these bonds are for the protection, not of the St Paul Company, but of certain creditors of the La Crosse and Milwaukie Company,

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their sufficiency is of no consequence to these respondents.

The respondents, as a further excuse for not delivering all of the property to the Minnesota Company, say, that since the order was made, they have discovered a mortgage of the rolling stock, made long ago to Bronson, Souter, and Knapp, which is a paramount title. This company, however, being owners of the equity of redemption, are entitled to possession until foreclosure, so that the alleged mortgage confers upon the respondents no right of possession, much less does it furnish any justification for disobeying the decrees of this court.

Several other technical, and, as I think, frivolous excuses are given why the respondents should not be compelled to perform the decree. These I shall not notice.

There is one reason for their conduct, however, of which I will speak. I apprehend it is the only one on which they have acted. They say that they are the real owners of the property in dispute; that the same is still in litigation, as they are prosecuting appeals from all the judgments deciding against their claims; and that it would be oppressive to take the property from them pending the litigation, especially as it would leave them without stock enough to work their road. I am quite sensible of the force of these positions, and have given them all the consideration which I think they deserve. If I could see that I have any just power to interfere, I might endeavor to mitigate the immediate hardships complained of.

It is to be observed, however, that this claim of re-

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spondents to the property is the very matter which was passed upon in the decree now to be executed. No *supersedeas* bond was filed to stay the execution of the decree, until the appeal could be heard in the supreme court. Besides, this very decree was entered in pursuance of the mandate of that court. The only title to the property yet set up, so far as I know, by the respondents, has been declared by the supreme court to be invalid; for, as I have already shown, the mortgage to Bronson, Souter, and Knapp may never ripen into an absolute title in any one; and under it the St Paul Company have no title whatever. That company is not the mortgagee therein, nor the assignee thereof. This court has decided, at least three times, that the St Paul Company has no title to the property. The presumption is in favor of the correctness of those decisions. Certainly, in this court, I am bound by them. Now, if they be sound, it follows, that for nearly four years the St Paul Company has had wrongful possession of this stock. Is it not time it should be given up? Suppose, however, that these decisions are wrong, and will be finally reversed. Then the property will be restored to the respondents in less than half the time during which, if they are right, it has been wrongfully withheld from the plaintiffs.

Under the decree which is here complained of, the Minnesota Company, on the faith of obtaining possession of this property, paid nearly half a million of dollars. They had demanded this decree as a condition precedent for investing so much money in an already heavily encumbered road. How can this court, with any pretence

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of justice, now say to them, we will not enforce the decree by which we assured you protection?

Every decree of a court which takes property from one man and gives it to another, involves a hardship in the mind of the person dispossessed. In the present case, while that hardship may be a very heavy one, and work a temporary injury not easily repaired, I see no way, consistent with my judicial duty to administer law and justice, to avoid enforcing this decree. Were I to refuse this motion, I do not see how I can ever hereafter attach any person, to compel the performance by him of a decree which he may be reluctant to obey.

I do not think the parties have intended any personal disrespect to the court, and would impose no fine or penalty for what is past. I conceive it to be the duty of the court now, however, to compel obedience to its order by this process of attachment, and, if necessary, by imprisonment.

Hon. Andrew G. Miller delivered an opinion, which he did not file, in which, among other things, he said:

“I propose that some competent person be appointed to ascertain the quantity of stock necessary fully to operate the road between Milwaukee and Portage, and report thereon; and on such report made, the St Paul Company shall furnish such additional stock as may be required, and give additional bond in the penal sum of say \$200,000, with sureties to be approved by the court, and conditioned for the proper use of the stock in their hands, and to pay for the use of such stock to such corporation as may be entitled thereto, on the decision of

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the court on the supplemental bill, and such other matters as may be in issue between them. *That an attachment be now granted*, but not to issue or be served, if these conditions are complied with, within a time to be named."

Judge Andrew J. Miller refusing to concur in the issuance of an attachment, except upon the terms of the above proposition, the motion was denied.

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GRANGER v. SWART.

I. THE BOUNDARY OF GOVERNMENT LANDS LYING ALONG LAKES AND RIVERS.

1. *Meandered line*.—The boundary to lands bordering on rivers and lakes is the meandered line established by the government surveyors.

2. *Accretions*.—If, at the date of an entry of government land, one of the boundaries of which is such meandered line, the lake or river extends to, and borders on, such line, accretions afterwards formed belong to the party holding title under the entry.

3. *Waste land*.—But if, at the time the entry was made, between such line and the bank of the lake or river, there was a body of swamp, or waste land, or flats, on which timber and grass grew, horses and cattle fed, and hay was cut, such land was not included within the entry.

II. Adverse possession which avoids a deed—

1. *Color of title*.—The adverse possession necessary to avoid the deed of a grantor, out of possession, must be under color of title.

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THIS was an action of ejectment tried to a jury. Walker had entered certain lands, which at one time bordered on Lake Koshkonong and the Rock River. The government surveyor had run a meandered line. Afterwards, but before the entry, as the evidence tended to show, a considerable body of land was formed by accretions. This land was low and marshy, but at certain seasons of the year it became dry. Grass grew upon it; hay was cut; and horses and cattle were pastured there. Walker conveyed the tract as it was entered by him to the defendant, who, claiming that the entry covered this land formed since the survey, entered into possession.

The plaintiff's title was derived from an entry made subsequent to the defendant's, which in terms covered the new land. He having made out a title, the defendant sought to avoid it by showing his prior entry and patent, claiming that they covered the premises in question.

Mr JUSTICE MILLER charged the jury as follows :

Gentlemen,—The plaintiff produces in evidence patents from the United States to Gilbert and Finch for the land described in the declaration, a conveyance from Finch to Gilbert, and one from Gilbert to himself. He also proves the defendant in possession at the commencement of this suit. He has thus made out a title, and established *prima facie* his right to recover.

To defeat the case thus made, the defendant claims that he has a prior title to the same land, which he

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attempts to prove by three patents from the United States to Martin Walker, and a deed from Walker to himself.

The first and principal question to be determined by the jury is, whether these patents cover the land in controversy.

The patents and deeds under which the defendant claims do not pass the title to the premises in question, unless, at the date of the entries on which they issued, the Rock River, where it is called a river, and Lake Koshkonong, where it is called a lake, extended to and bordered upon the meandered line which constitutes the boundary of the lands described in the patents.

In other words, if, between the meandered line which by the government survey was made one of the boundaries of the land sold to Walker, and the bank of Rock River and shore of Lake Koshkonong, there was at that time a body of swamp, or waste land, or flats, on which timber and grass grew, and horses and cattle could feed, and hay be cut, then the patents to Walker did not cover this land, but were confined to the actual limit of said meandered line.

On the other hand, if, when the entries were made, the bank of the river and shore of the lake, at an ordinary stage of water, were where this meandered line was represented by the United States survey, and the land in controversy has since been formed by a receding of the water, or by accretion to the shore and bank, then it became the land of the defendant, or of Walker, as the title might be in one or the other.

If the first of these positions be found by you to be

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true, the defendant has no title to the land ; if the second be true, he has title to the addition made by the accretion.

The defendant further relies upon the fact that, although the patents from the government to Gilbert and Finch may have conferred on them the legal title to the land in question, the deed from Gilbert to plaintiff was void, because the land conveyed was held adversely by the defendant.

In order to make this deed void, the defendant must have been in the actual possession of the land, claiming under a title adverse to that of Gilbert. The defendant says in his own testimony, that the only title under which he claimed the land was the patents to Walker, and the deed from Walker to him. If these patents and this deed did not cover the land in controversy, the mere claim or assertion that they did cover it, does not constitute a color of title which avoids Gilbert's deed.

The possession adverse to that of a grantor which avoids his deed must be under color of title ; and when the paper, or deed, or document which is claimed to constitute this color of title is produced, it must embrace the land in question, or it cannot operate to avoid a deed from one holding the true title. Otherwise a man in possession of a lot of land, in town or elsewhere, might make void every sale of it by its true owner, by merely asserting that his deed of some other lot covered the one of which he claimed to hold possession.

We have already instructed you as to the rule by which you are to determine whether the patents to

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Walker covered the land in question. If you find that they did not, then they do not give color of title to make void the deed of Gilbert to the plaintiff.

If the jury find a verdict for the plaintiff, they will find a general verdict. If they find for the defendant, they will say whether they find on the ground of the avoidance of Gilbert's deed by the defendant's possession, or on the ground that the defendant has the better title to the land.

Verdict and judgment for plaintiff.

On meandered lines, see *Johnson v. Pannell*, 2 Wheaton, 206; *Littlepage v. Fowler*, 11 *ib.*, 215; *Brown's Lessee v. Clements*, 3 Howard, 650; *Railroad Co. v. Schurmier*, 7 Wallace, 272.

Effect of survey, *Bates v. Illinois Central R. R. Co.*, 1 Black, 204. Accretions, *New Orleans v. U. S.*, 10 Peters, 662, 717; *Jones v. Johnston*, 18 Howard, 150.—[*Reporter.*]

DISTRICT OF MINNESOTA.

JUNE TERM, 1865.

Before Mr JUSTICE MILLER and Mr DISTRICT JUDGE
NELSON.

THE UNITED STATES v. M'CARTY.

I. THE PERIOD FOR IMPRISONING A PARTY CONVICTED OF PROCURING,
BY FRAUD, THE EXEMPTION OF A DRAFTED PERSON.—

1. *The act of February 24, 1864* (13 U. S. Statutes at large, 10), assumes to fix a definite period of imprisonment as a punishment for the offence of procuring, by fraud, the exemption of a drafted person, and leaves to the court no discretion in that regard.

2. *The period of punishment therein fixed* is the same as the period for which the party drafted had to serve, which, as provided by section 11 of the act of March 3, 1863 (12 U. S. Statutes at large, 733), is to the end of the rebellion, but not more than three years.

II. THE FIRST ABOVE MENTIONED ACT DOES NOT FIX A PERIOD TO
THE IMPRISONMENT.—

1. *The offender may* not be imprisoned three years; for the rebellion may not continue so long.

2. *He cannot be sentenced* to confinement during the rebellion; for shortly after he is condemned, the rebellion may terminate, and then the court could not inquire into the matter.

THIS was an indictment found against the defendant for procuring by fraud the exemption of a drafted person.

His counsel moved to quash the bill, and, among other

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reasons for the motion, insisted that the act of Congress, under which the indictment was found did not assign a certain period to the imprisonment, to which, in the event of his conviction, he would be subject.

Mr JUSTICE MILLER.—The act of February 24, 1864, § 21 (13 U. S. Statutes, 10), under which this indictment is found, after describing the offence, says, that the convicted person shall “be punished by imprisonment for the period for which the party was drafted,” meaning the party whose exemption was procured by fraud. This statute clearly contemplates a definite period of penal imprisonment, and does not leave the court any discretion in regard to its duration. When we come to inquire for what period the party was drafted, we look to the law under which the draft was made.

Section 11 of the act of March 3, 1863 (12 U. S. Statutes, 733), was the law governing the time of service of drafted men, when the act was passed under which this defendant stands indicted. We are not aware that it has since been modified so as to affect the case under consideration. That section provides, that all persons duly enrolled “shall be subject, for two years after the first day of July succeeding the enrolment, to be called into the military service of the United States, and to continue in service during the present rebellion, not, however, exceeding the term of three years.”

The offence charged against the defendant was committed during the war; and as well his liability to, as the extent of the punishment which we must impose,

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must depend upon the facts and the law as they then existed.

What sentence, then, shall be pronounced?

Is he to be imprisoned for three years? If so, it is obvious that the confinement may continue longer than the period for which the party whose exemption he procured was drafted. That period could extend to three years, only in the event that the rebellion continued so long. There seems every probability that the rebellion has not continued so long, that it is now ended. But can this court take judicial notice that such is the case? There is no proclamation to that effect. Is it consistent with the act prescribing the punishment, to suppose that its extent was to be fixed by any evidence to be received by the court as to the length of time the rebellion lasted after the exempted party was drafted? This cannot be; because an offender might be tried and convicted within a few months after the law was passed, and before the time for which the rebellion might continue could possibly be predicted. It is clear, from this examination, that the time which might elapse between the drafting of the exempted person and the close of the rebellion cannot, if the defendant be convicted, be adopted as the duration of his punishment. As three years would probably much exceed the time during which the drafted man would have had to serve, a sentence for that period would, to that extent, be in excess of the punishment prescribed by the law, and beyond the authority of the court. And as the statute has not, in reference to the duration of the rebellion, prescribed any period, or furnished any

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authority to the court to fix it, or any criterion by which it can be fixed, we are driven to the conclusion that there is no ascertainable period of punishment presented by the law. For this reason the indictment must be quashed.

Motion to quash the indictment sustained.

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M'NEIL v. HILL.

- I. WAREHOUSE RECEIPTS have, by custom, come to be considered in commercial transactions as representatives of the property mentioned in them.
- II. THE INDORSEMENT or assignment of such instruments are regarded as equivalent to the delivery of the article.
- III. ESTOPPEL.—The warehouseman is estopped by his statement and promise in the receipt, to deny that he has the articles mentioned therein, in an action by an indorsee or assignee, who has purchased the paper in good faith.

THE defendants had given a warehouse receipt to Upham & Co. for 800 bushels of wheat. Upham & Co. agreed with the plaintiffs to sell to them a much larger amount of wheat, and, in part execution of this agreement, assigned to the plaintiffs the receipt of the defendants. The plaintiffs presented the receipt to the defendants, and demanded the wheat mentioned therein; and upon refusal to deliver it, they brought this suit to recover their damages.

The cause came on to be tried to the court without a jury. The defendants offered to prove that they had

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never received the wheat from Upham & Co., and had no such wheat as mentioned in the receipt at the time it was given ; but that they issued it to those parties, as a security for a loan of \$400, or an advance made to them on a purchase of 800 bushels of wheat, to be delivered in future.

MR JUSTICE MILLER.—As civilization has advanced, and commerce extended, new and artificial modes of doing business have superseded the exchanges by barter and otherwise, which prevail while society is in its early and simple stages. The invention of the bill of exchange is a familiar illustration of this fact. A more modern, but still not recent invention, of like character, for the transfer, without the somewhat cumbersome, and often impossible, operation of actual delivery of articles of personal property, is the indorsement or assignment of bills of lading and warehouse receipts. Instruments of this kind are *sui generis*. From long use in trade, they have come to have, among commercial men, a well understood meaning. And the indorsement or assignment of them as absolutely transfers the general property of the goods and chattels therein named, as would a bill of sale. *Austin v. Craven*, 5 Taunton, 167 ; *White v. Wilkes*, 12 East, 614 ; *Conrad v. The Atlantic Insurance Co.*, 1 Peters, 386 ; *Gardiner v. Suydam*, 7 New York, 3 Selden, 357 ; *Gibson v. The Chillicothe Bank*, 11 Ohio State, 311.

When a warehouseman issues such a receipt, he puts it in the power of the holder to treat with the public on the faith of it. He enables him to say, and to induce

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others to believe, that he has certain property, which he can sell or pledge for a loan of money. If the warehouseman gives to the party who holds such receipt a false credit, he will not be suffered to contradict the statement which he has made in the receipt, so as to injure a party who has been misled by it. That is within the most exact definition of estoppel. If A. gives to B. his note for \$100, although he has received no value therefor, and may defend against the note in a suit brought by B., yet if B. sells the note to a third party who does not know of the facts, A. then must pay the note. Just so in the case of a warehouse receipt. If A. issues such a paper to B., for articles which he has never received, a third party treating with B. on the faith of the statement and promise contained in the receipt, will hold A. for the goods or their value. It is of no consequence what the transaction may be between the original parties; whether the receipt, as is claimed here, was intended as a security for a loan, or was entirely false.

The defendant here offers to prove that he never received the property mentioned in the receipt which he has given, but that the paper was issued as a security for a loan, or as an advance on wheat to be delivered. But he has stated in this receipt that he has the wheat in his warehouse, and also promised therein to deliver the wheat to the order of Upham & Co. These plaintiffs, believing this statement to be true, and relying on this promise, bought of Upham & Co. the receipt and property mentioned therein. They were justified in doing this, and the defendants must respond to their promise. The evidence is not admissible.

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AULTMAN v. JONES.

I. WHEN AN AGENT TO SELL ON CREDIT, TAKING A MORTGAGE, MAY BID IN, AND HOLD THE PROPERTY AGAINST HIS PRINCIPALS.

1. *Not by virtue of such agency.*—An agent to sell property on credit, taking a mortgage to secure the deferred payments, is not thereby authorized to foreclose the mortgage.

2. *But only by express authority.*—He can buy the property in, on the foreclosure, for himself, and hold it, only when so expressly authorized by his principals.

3. *When so authorized.*—If he be so authorized, and so bids in the property in his own name, he does so for the benefit of his principals. He is liable to them for the amount which he may have realized on a sale of the property by him. But he should be allowed his costs, and the expenses of the foreclosure sale and re-sale.

THIS was a writ of error to the district court for Minnesota.

The plaintiffs were manufacturers of thrashing and reaping machines. They had employed the defendant as their agent to sell their machines. Under their instructions, he had sold certain of them partly on credit, taking, to secure the deferred payments, mortgages on the machines sold. These mortgages empowered the plaintiffs, or their agents or assigns, to take possession of the property, and foreclose them by sale, if default should be made in the payment of any instalment of the purchase money secured thereby.

The defendant foreclosed several of these mortgages, bid in the machines in his own name, and sold them again for prices averaging about four times his bid. On demand, he refused to account for more than his bids.

The plaintiffs brought *assumpsit* for the recovery of

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the amounts realized by the defendant on the re-sale of the machines by him. To this the defendant plead the general issue, with notice of special matter. The cause was tried to a jury. On the trial, testimony was introduced, tending to show a special authority in the defendant to foreclose the mortgage and bid the property in for his own benefit. This was denied by the plaintiffs.

Mr Lamprey, for the plaintiffs.

Mr Otis, for the defendant.

Mr JUSTICE MILLER charged the jury as follows :

Gentlemen,—There are in this case two principal matters of dispute, which must be settled by you as the foundation of your verdict.

1. Had the defendant any authority to foreclose the mortgages, which have been offered in evidence?

If you find that he had not, then he has wrongfully possessed himself of the plaintiffs' property, and is liable to them for the value of the machines.

2. If you find that he had authority to foreclose these mortgages, you will next inquire whether he was authorized by an express agreement to buy in for himself the property which he was thus authorized to sell.

If you find that he was authorized by the plaintiffs to act at the sales both as seller for them, and buyer for himself, then he is liable to the plaintiffs for the amounts bid by him, subject to a deduction of all sums paid on such bids, and the necessary costs and expenses of foreclosure paid by him. He is not entitled to compensation for personal services.

If you find that he was authorized to foreclose the

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mortgages, but was not authorized to bid in the property for himself, then the purchases must be considered as made for the benefit of the plaintiffs. The defendant must be treated as their agent in making the purchases, and in afterwards selling them again. As he has refused, on demand, to account as agent, or to pay to the plaintiffs the money and notes which he received from sales of the machines, he is liable to the plaintiffs for the amount for which they were sold. But if he is held as agent, he is entitled to the sums which he has paid on his bids, a reasonable compensation for his services in foreclosing and re-selling, and the expenses incident to both these sales. These sums should be deducted from the sums realized by him from the sales to third parties.

The verdict of the jury was founded on the latter hypothesis.

Judgment for the plaintiffs.

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DISTRICTS OF MISSOURI.

OCTOBER TERM, 1865.

Before MR JUSTICE MILLER, MR DISTRICT JUDGE TREAT,
and MR DISTRICT JUDGE KREKEL.

ELGEE'S ADMINISTRATOR v. LOVELL.

I. PLEA OF ALIEN ENEMY.—

1. *Disability at commencement of suit.*—In a plea of alien enemy, by which it is sought to avoid the suit altogether, it is necessary to aver that such was the status and character of the plaintiff at the commencement of the suit.

2. *Disability arising afterwards.*—If the disability arise afterwards, the further prosecution of the suit is suspended merely until peace is restored.

3. *In action on contract.*—In an action on contract, the plea is good in bar, to show that the contract was made in time of war, with a public enemy, by a party in allegiance to the government in whose courts the suit is brought.

II. PLEADING IN DETINUE.—

1. *Artificial words not to govern.*—Notwithstanding the artificial words of a declaration in detinue, if the action be grounded on a tortious seizure by the defendant of the property mentioned, it will not be held, contrary to the fact, an action on contract.

2. *Whether action by public enemy sustainable, quære?*—Whether a public enemy can sustain an action in our courts for a trespass committed in his country in time of war, *quære?*

III. PLEADING UNDER ACT OF CONGRESS.—

1. *Confiscation Act.*—The bar to an action provided in section 6 of the act of July 17, 1862 (12 U. S. Statutes at large, 591),

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commonly known as the Confiscation Act, applies only to property seized under the act. A plea which does not allege that the property was seized under the act, is bad.

2. *Act relating to abandoned property.*—A plea based on the act of March 3, 1863 (12 U. S. Statutes at large, 820), relating to abandoned property, which does not aver that the property had been taken in a district which had been declared in insurrection, is bad.

3. *Plea must show non-existence of special property in plaintiff.*—The plea must exclude the idea of any special property in the plaintiff, with a present right of possession in him, in order to be good.

IV. REMEDY TO RECOVER PROPERTY SEIZED UNDER ABANDONED PROPERTY ACT, EXCLUSIVE IN COURT OF CLAIMS.—The remedy provided by the act of March 3, 1863, for the recovery of property captured or abandoned in the enemy's country, whether the capture be in accordance with its provisions or not, is exclusive in the court of claims.

(1.) *Argu.*—This position is supported by a consideration of the circumstances of the agent of the treasury, who collects the property.

(2.) *Argu.*—The act contemplates that, in some instances, property will be seized which should be returned to the owner.

(3.) *Argu.*—The act makes the government the holder of the proceeds of the property, in trust for such claimant as may appear and show himself entitled to it. It can be recovered from the government only by such proceedings as it may authorize.

V. AMNESTY OATH.—It is no answer to a plea of alien enemy, to aver that the plaintiff has taken the oath prescribed by the amnesty proclamation.

VI. RELATIONS OF CITIZENS OF NATIONS AT WAR.—

1. *Enemies to each other.*—In time of war, all the subjects of the belligerent nations are themselves enemies to each other.

2. *No act of disloyalty necessary.*—In the rebellion, a resident in the "Confederacy," and subject to its control, is a public enemy, although he may have committed no act of disloyalty.

VII. EFFECT OF PROCLAMATION ON STATUS OF LOYAL RESIDENTS OF "CONFEDERACY."—

1. *Cannot change the rule.*—No proclamation can change or

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modify this rule, and it is doubtful if it can relieve a party from the disabilities which it imposes.

2. *Its design.*—The President, in his amnesty proclamation, did not intend to place parties who should avail themselves of it in any better position than those who, residing in the insurrectionary districts, had always maintained their allegiance to the Federal government.

3. *Such persons need no pardon.*—When the war ceases, all their rights are at once restored, and their disabilities are removed.

4. *Whether action sustainable, quære?*—Whether a public enemy can sustain an action in our courts for a trespass committed in his country in time of war, *quære?*

THE plaintiff brought his action in the circuit court of the State of Missouri for the county of Saint Louis, to recover the possession of 275 bales of cotton. The defendant appeared, and made affidavit that he held the cotton for the government of the United States, as its agent, and prayed that the case might be removed into this court, under the act of Congress of July 28, 1866 (14 U. S. Statutes at large, 329). The State court ordered the removal accordingly.

The plaintiff having died, and Gills having been appointed his administrator, the cause was proceeded in, in his name.

Under a rule to re-plead in this court, the plaintiff filed the ordinary declaration in detinue, to which the defendant pled the general issue and four special pleas. These four pleas were as follows :

“2. And for further plea in this behalf, the said defendant says, that the plaintiff ought not to have and maintain his aforesaid action thereof against him, because, he says, that before and at the time of the committing the griev-

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ances in the said declaration complained of, and before and at the time of the commencement of this suit, the said John K. Elgee, the original plaintiff herein, was a resident of the State of Louisiana, the people whereof were then, and now are, in insurrection against the United States, and at war with the same, and that the said Elgee was then and there in rebellion against the lawful government of the United States, and did then and there adhere to, and aid, and acknowledge allegiance to, the so-called Confederate States of America, then waging war against the United States of America, and was then and there a public enemy of the United States, and not a loyal citizen thereof, and this the defendant is ready to verify; wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him."

"3. And for a further plea in this behalf, the said defendant says, that the said plaintiff ought not to have and maintain his aforesaid action thereof against him, because, he says, the said John K. Elgee, in his lifetime, claimed, and this plaintiff, since his death, claims, the said cotton in said declaration mentioned, as the property of the said John K. Elgee, wrongfully taken and detained from him, the said John K. Elgee, by the agents of the United States, and not otherwise. And the said cotton was, at the commencement of this suit, and now is, claimed by the United States as abandoned property, under the act of Congress approved March 12, 1863; and that, at the time of the commencement of this suit, the said defendant was in possession of the said cotton in the said declaration mentioned, as agent

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of the United States, and not otherwise, and this the said defendant is ready to verify; wherefore," &c.

"4. And for a further plea in this behalf, the defendant says *Actio non*, because, he says, that the said goods and chattels in said declaration mentioned were, at the time of the commencement of this suit, and now are, the property of the United States, and this he is ready to verify; wherefore," &c.

"5. And the said defendant, by his attorney, comes and defends the wrong and injury when, &c., and says, that the said plaintiff ought not to have or maintain his aforesaid action thereof against the said defendant, because, he says, that the said 572 bales of cotton, for the recovery of which this action was instituted, had, prior to the institution of said action, to wit, in the month of March, 1864, in the State of Mississippi, been taken, received, and collected, as abandoned property, into the possession of one Ralph S. Hart, a special agent, appointed by the Secretary of the Treasury to receive and collect abandoned or captured property in said State, in pursuance of the terms of the first section of an act of Congress entitled, 'An act to provide for the collection of abandoned property, and for the prevention of frauds in insurrectionary districts within the United States,' approved March 3, 1863; that prior to the time when the said cotton was taken, received, and collected into the possession of the said Ralph S. Hart, special agent as aforesaid, the said State of Mississippi had been, by the proclamation of the President of the United States of July 1, 1863, designated as in insurrection against the lawful government of the United

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States; that the said cotton was, in pursuance of the second section of the act aforesaid, forwarded by the said Ralph S. Hart, special agent as aforesaid, who had received and collected the same, from the said State of Mississippi, to a place of sale within the loyal states, and, in the course of being so forwarded, came, at the city of St Louis, in the State of Missouri, into the possession of this defendant, as agent of the United States, and at the time of the institution of this action, and the issue and service of the summons therein, was in the possession and custody of this defendant as such agent, and not otherwise; that the possession and custody of said cotton by this defendant, at the time of the institution of this action, and the issue and service of the summons therein, was in pursuance of the act aforesaid; that this defendant then and there held such possession and custody for and on behalf of the United States, and not otherwise; and that the said cotton was then and there claimed by the United States as abandoned property under the act aforesaid, and is still so claimed. And this defendant is ready to verify; wherefore," &c.

To these pleas were demurrers, which to the second and fifth were overruled, and to the third and fourth sustained. Thereupon, to the second and fifth pleas, the plaintiff filed replications, as follows:

"And now comes the said plaintiff, and for replication to the plea of said defendant by him secondly above pleaded, says, that the said plaintiff, by reason of anything in said plea mentioned, ought not to be barred from having and maintaining his aforesaid action thereof

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against the defendant, because, he says, that before, and at the time of the commencement of this suit, the people of the State of Louisiana were not, nor are they now, in insurrection against the United States, and were not in rebellion against the lawful government of the United States; and the said John K. Elgee did not there and then adhere to, or aid, or acknowledge allegiance to, the so-called Confederate States of America, then waging war against the United States of America, and was not there and then a public enemy of the United States, and was a loyal citizen thereof; and this the said plaintiff prays may be inquired of by the country," &c.

"And for a further replication to the plea of the defendant by him secondly above pleaded, the said plaintiff says that he, the said plaintiff, by reason of anything in said plea mentioned, ought not to be barred or precluded from having or maintaining his aforesaid action thereof against said defendant, because, he says, that the President of the United States did issue his proclamation, bearing date the 8th day of December, 1863, whereby there was promised a full pardon and amnesty, with restoration of all their rights of property, except as to slaves, to all those living in the said insurrectionary districts, except certain classes of persons therein mentioned, who should thereafter take, subscribe, and keep inviolate, a certain oath therein prescribed; and that, prior to the commencement of this suit, the said John K. Elgee, then living in said insurrectionary districts, not being one of the persons excepted by the proclamation of the President of the United States aforesaid, did take and sub-

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scribe the oath required by said proclamation, which was duly registered in accordance therewith, and said John K. Elgee did, from thenceforth, for ever afterwards keep and maintain said oath inviolate, by means whereof all his rights of property in the goods, wares, and merchandise mentioned in said declaration, were, by the laws of the United States, and by the force of this proclamation, restored to him, and this he is ready to verify; wherefore he prays judgment," &c.

"And for replication to the plea of the defendant by him fifthly above pleaded, the said plaintiff, by reason of anything in said plea mentioned, ought not to be barred or precluded from having or maintaining his aforesaid action thereof against said defendant, because, he says, that the property in said declaration mentioned was, prior to and at the time it came into the possession of said Ralph S. Hart, as alleged in said plea, the property of, and belonged to, the said John K. Elgee; and that the President of the United States did issue his proclamation, bearing date the 8th day of December, 1863, whereby there was promised a full pardon and amnesty, with restoration of all their rights of property, except as to slaves, to all those living in the said insurrectionary districts, except certain classes of persons therein mentioned, who should thereafter take, subscribe, and keep inviolate, a certain oath therein prescribed; and that, prior to the commencement of this suit, the said John K. Elgee, then living in said insurrectionary districts, not being one of the persons excepted by the proclamation of the President of the United States aforesaid, did take and subscribe the oath required by said

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proclamation, as therein mentioned, which oath was duly registered in accordance therewith, and said John K. Elgee did, from thenceforth, for ever afterwards keep and maintain said oath inviolate, by means whereof all his rights of property in the goods, wares, and merchandise mentioned in said declaration were, by the laws of the United States, and by the force of said proclamation, restored to him, and the said property was so taken and held from said John K. Elgee contrary to said proclamation and the laws of the United States, and this he is ready to verify; wherefore he prays judgment," &c.

And to these replications the defendant demurred.

Messrs Glover & Shepley, for plaintiff.

Messrs Drake, Hughes, Broadhead, & Hill, for defendant.

MR JUSTICE MILLER.—The second plea is evidently directed to the personal character of the plaintiff. It may be regarded as a denial of his right, either to bring any suit in this court, or to bring a suit for property found in an insurrectionary district.

Looked at in the first view, it is a plea in abatement, in analogy to the plea of alien enemy. As such it seeks to defeat this suit by the charge that the plaintiff is in the attitude towards the government, in whose courts he seeks relief, of an alien enemy in time of war. But the plea does not contain an averment that such was the character and status of the plaintiff when the suit was commenced. That is a necessary averment in such a plea. For want of it, the plea is bad. Chitty, in his approved forms, incorporates such an allegation (3

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Chitty's Pleadings, 911); and on this point, in *Levine v. Taylor*, 12 Mass., 8, it is said: "This disability resembles that arising from the outlawry of the plaintiff; as to which, if pleaded in disability, it is decided that if the cause of action accrues, or perhaps if the action is commenced whilst the plaintiff is thus disabled, the plea quite overthrows the writ; and after a pardon or reversal of the outlawry, the plaintiff must begin *de novo*. But if the disability occurs after the commencement of the action, it only suspends the proceeding *quousque*, &c.; and after the disability is removed, the plaintiff may recontinue the suit by re-summons or re-attachment. Accordingly, in several cases, where the action was commenced before the declaration of war, this court have expressed an opinion that it produced only a temporary disability; and, at their recommendation, the parties have agreed to continuances without costs on either side, in order to avoid the trouble and expense of new process at the termination of the war."

It is obvious from this, that when the effort is to avoid the suit altogether, the disability must exist at its commencement, for if it arise subsequently, the further prosecution is suspended merely until peace is restored. See *Faulkland v. Stanion*, 12 Mod., 400.

In an action on contract, the plea of alien enemy is good in bar, when it shows that the contract sued on was made in time of war with a public enemy, by a party in allegiance to the government in whose courts the suit is brought. *Boussmaker ex parte*, 13 Vesey Jr., 71; *Willison v. Patteson*, 7 Taunt., 439.

It is insisted that this is an action on contract, because

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the declaration alleges a bailment by the plaintiff to the defendant to be re-delivered on demand, and a demand and refusal;—that therefore the plea is good in bar.

It is true that there are authorities holding that the action of detinue is sometimes treated as an action on contract; and it is no less certain that the allegations of the declaration set out in words a contract of bailment.

But without pursuing the authorities as to whether detinue is to be held an action on contract or in tort, it is sufficient to say, that it is often brought for a tort; and we think it would be straining the technical point beyond its just use, to hold the plaintiff to the literal meaning of the words of his declaration. The form of words, like that in trover and ejectment, is purely artificial and conventional, and is never required to be proved as laid. It being clear, from all that appears in this case, that the suit is grounded on a tortious seizure by the defendant of the property mentioned, we will not hold, on this demurrer, contrary to the fact, that the plaintiff has sued upon a contract, because, by the rules of pleading, he has been compelled to use a fictitious form.

Viewing the case as in tort, the question has been asked and discussed, whether a public enemy can sustain an action in our courts for any trespass committed in his country, in time of war, by one owing allegiance to our government?

It is unnecessary to decide this question here.

It is claimed that section 6 of the act of July 17, 1862 (12 U. S. Statutes at large, 591), commonly called the Confiscation Act, is decisive of the question raised on this plea. That act provides that the pro-

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perty of certain individuals may be seized by the President, or under his orders, and turned over to the courts, which shall, by a regular judicial proceeding, confiscate and sell the same. The closing provision of the 6th section alluded to, reads thus: "And it shall be a sufficient bar to any suit brought by such person for the possession or use of such property, or any of it, to allege and prove that he is one of the persons described in this section."

Assuming that the plaintiff is shown to be one of the persons described in that section, which is doubtful, we are of opinion that the bar applies only to property seized under that act, and to no other. This is apparent from the terms of the section. Provision is made for the seizure of the property, and for a judicial proceeding for its condemnation; and then follows the clause giving a bar to the proceeding. The bar could be alleged and pleaded only to a suit to condemn property seized under the act. There is no allegation here that this property was seized under the Confiscation Act, or that the defendant had any purpose to libel it in any court for condemnation.

On the whole, the defendant having expressed a wish to amend this plea, so far as to make the allegation of the plaintiff's character apply to the time of the bringing of this suit, he is permitted to do so now; and such amendment being made, the demurrer to that plea will be overruled.

The third plea is based on the act of March 3, 1863 (12 U. S. Statutes at large, 820), which provides, that the special agent may "receive and collect all abandoned

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or captured property in any State or territory, or any portion of any State or territory, of the United States, designated as in insurrection against the lawful government of the United States, by the proclamation of the President of July 1, 1862." In order to show his right under this act, the agent must show that the property was taken by him in a district which had been designated as in insurrection. This plea does not contain such averment, and is therefore bad.

The fourth plea is bad, because, while the general property in the cotton may be in the United States, this fact does not exclude the idea of such a special property, with present right of possession in the plaintiff, as may enable him to sustain the action.

The fifth plea presents the main ground of defence on the merits, if the personal status of the plaintiff is such that he can bring his suit in this court. It contains a full statement of the facts in the case. It shows that the cotton mentioned in the declaration was seized as abandoned property in one of the districts declared by the proclamation to be in a state of insurrection, by a special agent of the treasury department for that district; and that, when this suit was brought, it was held by the defendant as an agent of the government, with the view of disposing of it under the act.

The objection taken to it is, that it does not aver that the property, when taken possession of by the treasury agent, was captured or abandoned property, nor in any other manner show that it was rightfully seized.

Much and able argument has been presented on both

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sides of this issue, drawn from considerations of the powers possessed by military and civil officers in an enemy's country; the general policy of the government in reference to permitting suits to be brought to recover property in the hands of its revenue officers; and from the construction of the act of March 2, 1832 (4 U. S. Statutes at large, 632), as applicable to this case. But the majority of this court are of opinion that the solution of the question must be found in the just construction of the act under which the treasury agent proceeded, namely, the act of March 3, 1863 (12 U. S. Statutes at large, 820).

This statute enacts, that property in any of the States, or parts of States, the inhabitants of which are declared to be in insurrection, which has been captured by our military forces, or been abandoned by its owner, shall be taken possession of by special agents of the treasury department, appointed for that purpose, and may be used by the United States, after appraisal, for any of its purposes, or sold, and the proceeds of the sale deposited in the treasury. Section 3 of the act, after providing that such agents shall give bond, with such securities, and in such amounts, and as often, as the secretary may require, and keep, in proper books, accounts of all their transactions, adds: "And any person claiming to have been the owner of any such abandoned or captured property, may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof, in the court of claims; and on proof to the satisfaction of said court of his ownership of said property, to his right to the proceeds thereof, and that he has

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never given any aid or comfort to the present rebellion, to receive the residue of such proceeds, after the deduction of any purchase money which may have been paid, together with the expense of transportation and sale of said property, and any other lawful expenses attending the disposition thereof."

The question is, whether Congress intended to make the remedy given by this act exclusive of all others, or to permit the treasury agents to be sued for the possession or proceeds of such property wherever the party aggrieved might find a court of general jurisdiction.

The hardships, on the one hand, of allowing these agents, without liability to the law, at their discretion, to seize upon any property anywhere in these insurrectionary districts; and, on the other hand, of subjecting persons in their situation to be harassed by litigation at the hands of every person claiming an interest in the property, have been forcibly urged upon us. It is not inappropriate to remark, that their functions were to be exercised, so far as the seizure of property was concerned, in an enemy's country. They were vested with almost unlimited powers over all the property in the designated districts. They could take, and hold, and proceed against, whatever they, in the exercise of their arbitrary judgment, saw fit to seize. All that, on behalf of the plaintiff, has been urged in this regard is very true. But if, in the exercise of functions so delicate and so odious, in an enemy's country, surrounded by hostile inhabitants, they were to have every step in their proceedings tested by the courts of law, the expenses of judicial proceedings imposed upon them, and the delays incident thereto

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interposed, their office would be practically useless, and few men of responsibility would be willing to accept it. The very considerations urged for the plaintiff, go to show that the remedy prescribed by the law was intended to be exclusive.

Another circumstance of their situation, which should be noted, is this, that they were to discharge these duties not only in an enemy's country, but in such parts thereof as had been overrun, and were then held by our military forces. While these forces were in the occupancy of any section of country, all the movable property therein would necessarily be liable to destruction by the soldiers. And when the army advanced to other lines, the yet more lawless mob were left to depredate upon what should remain. Under such circumstances, it could be no great hardship—on the other hand, it might be the best and the only protection to the owner—to have an authorized agent of the government intervene, and take and preserve the property, to be restored at a proper time and under proper circumstances. Congress saw fit to prescribe that time and those circumstances in the act, evidently intending to exclude all other means of determining them.

The act evidently contemplates that, in some instances at least, property will be seized which ought to be returned to its owner, or for which compensation should be made by paying him the proceeds. Otherwise it were unnecessary to provide any means of determining when a return should be made. And the remedy applies to property taken by mistake, or by the unjustifiable act of the agent, equally as to property which has been aban-

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doned or captured. It is equally appropriate and necessary. Indeed, the just occasion for it is greater. It is answered, with much ingenuity, that the remedy is by petition in the court of claims, and that, in fact, the whole act assumes that it is only captured or abandoned property which, or the proceeds of which, may be recovered by that process; that, beyond the definite limits set by those terms, the remedy has no application. But this I think is sticking in the bark. It does not meet the fact patent upon the act, that, by means of the remedy which it provides, an inquiry whether the property is abandoned or captured is to be made, in order to determine whether a return should be awarded.

There is yet another view which may be taken. The proceeds of property seized by the agent is to be deposited with the treasury, where, for the time limited, they may be said to await the claimant who shall show himself entitled thereto. The act makes the government a holder of the property, or its proceeds, as a trustee for such party. A proceeding of some sort against the government is necessary to compel it to surrender the property which it thus holds in trust. But it cannot be sued for this, or any other matter, unless it authorize the proceeding against it. Of course it may, in its grant of such authority, prescribe the manner and the court in which it shall be called to account; and that manner must be pursued in the tribunal provided. That is what Congress has done here. It has authorized a suit against the government, to be prosecuted by petition in the court of claims. That is the situation in respect of the proceeds of property which has been sold. And whatever

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may be said in that respect, is equally true of the property when in the hands of the agent. To suppose that Congress sent forth its civil agents into a hostile country to perform these delicate functions, and left them liable to actions for damages in any court within whose territorial jurisdiction they might chance at any time to be, and at the same time provided a forum and a rule by which what it considers right in the premises may be determined, is a reflection on that body, which, in this case, I do not think it deserves.

I have not noticed the fact that the statute provides that a bond, with abundant security, is to be given by the agent, because it is somewhat aside from this inquiry. It may be that, in the case of an arbitrary exercise of authority over property not liable to seizure, under color of the law, the agent's bond might be sued by the government for the use of the injured citizen. But upon that, I need not here remark.

I am of opinion that Congress intended to prescribe to all claimants, who should prove their loyalty and their right to the property, this remedy for all cases of seizure by agents under this law, whether made in strict accordance with its provisions or not; and also, that this should be the exclusive remedy in such cases, unless, perhaps, in some cases, a suit might be maintained on the official bond.

The demurrer to this plea is overruled.

At a subsequent day in the term, the plaintiff filed replications to the second and fifth pleas.

To these replications, demurrers were interposed,

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which, being argued by the learned counsel who had argued the questions raised before, were decided by the court.

MR JUSTICE MILLER.—The act of March 3, 1863, evidently contemplates that property of loyal citizens might and would be taken under it; for the provision for claimants asserting their rights in the court of claims is restricted to such persons as can prove that they have “never given any aid or comfort to the present rebellion.” Such persons never having been guilty of any offence against the government, need no pardon, and are surely in as good condition as pardoned traitors.

Property seized by a treasury agent in an insurrectionary district, as abandoned property, may be owned by a loyal citizen of a loyal state; and yet his only remedy is an application to the court of claims. The amnesty of the President was not intended to, nor could it, place a man who has committed treason in a better situation, in reference to property so seized, than a loyal citizen of a loyal state.

This replication is therefore bad as an answer to the fifth plea.

Does the act remove the disability to sue which is set forth in the second plea?

This plea is not founded on any act of Congress, nor on any law growing out of our State or national jurisprudence. It is based on a principle of the law of nations, recognized and enforced in all civilized countries, that, in time of war, an enemy cannot sue in the courts of the country with which his nation is belligerent.

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This grows out of the principle, that all persons, citizens or subjects of the nations thus at war, are themselves enemies each to the other. In the war of the current rebellion, this principle has been extended to all the citizens of the rebellious States found inside of the so-called Confederate lines. The Prize Cases, 2 Black, 635; *Mrs Alexander's cotton*, 2 Wallace, 404.

According to this principle, a man residing in the Confederacy, and subject to its control, is, in law, a public enemy, although he may have committed no act of disloyalty. He is so far a public enemy that, while the war is flagrant, his property found on the high seas is lawful prize of war; and that he cannot, in our courts, maintain any suit against citizens residing in loyal states. These are disadvantages imposed upon him by the law of nations, and not by our local, or national legislation. And as no proclamation of the President can change or modify this law, I doubt very much whether it can relieve any party from the disabilities which it imposes. This disability is independent of any personal guilt, and grows out of no violation of any criminal statute. The right of the President to pardon for all offences against the laws of Congress, to extend amnesty where there has been personal guilt, is not questioned. Whatever his power, I have no idea that he intended to do more than this. He did not purpose to place the parties who should avail themselves of this proclamation in any better position than those who, residing in the insurrectionary districts, had always maintained their allegiance to the Federal government.

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Such persons need no pardon. In my judgment, all their rights of property and person are at once restored when the war ceases. The disabilities under which they lay were imposed, not by reason of their personal guilt, but were necessities of the civil war. When those necessities ceased, their disabilities ceased, in all courts, and in all places. Being without guilt, they need no pardon. On the contrary, they merit the gratitude of the government and of the people. It is absurd to suppose that the President, if he had the power, would have the wish, to place traitors in a better posture than that in which loyal persons stand.

That the plaintiff, after taking the oath of allegiance, became a loyal citizen, and, at the time of bringing his suit, was under no disability from residence, may be true; but these replications do not show it, and are therefore bad.

The demurrer is sustained.

Demurrer sustained.

Judgment was ordered on these demurrers for the defendant, and the judgment afterwards affirmed in the supreme court by an equal division of the judges.

DISTRICT OF IOWA.

OCTOBER TERM, 1867.

*Before Mr JUSTICE MILLER, on writ of error.*THE UNITED STATES *v.* 10,000 CIGARS—
ROBESON, *Claimant.*

I. THE STATUTE MAKING INTERESTED PARTIES COMPETENT WITNESSES IN ALL CASES OF A CIVIL NATURE.—

1. *Civil Actions.*—The phrase “civil action,” in the 3d section of the act of July 2, 1864 (13 U. S. Statutes at large, 351), includes all cases of a civil, as contradistinguished from those of a criminal, nature.

2. *Seizure under internal revenue law.*—A seizure of property for violation of the internal revenue law, and the controversy arising upon a claim interposed thereto by a third party, is within the act.

3. *Claimant as witness.*—The claimant is a competent witness in his own behalf.

II. OF REPEALS BY IMPLICATION.—

1. *Implication must be irresistible.*—Only a necessary and irresistible implication will be held to operate a repeal of a statute.

2. *What is not such repeal.*—A general law was passed admitting interested parties to testify as witnesses in all cases; afterwards a special law was passed, admitting interested parties to testify in a certain contingency: *held*, that the later did not repeal the earlier provision.

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III. CONSTRUCTION OF ACTS RELATIVE TO INTERESTED WITNESSES.—

The act of July 2, 1864, the 2d section of the act of February 28, 1865, and the 9th section of the act of July 13, 1866, construed.

THIS was a writ of error to the district court for the district of Iowa. The property had been seized by the proper officers, and Robeson interposed a claim thereto. The issue was tried to a jury, when the claimant offered himself as a witness. He was admitted by the court to testify, under the exception of the district attorney.

The trial having resulted in a verdict for the claimant, the government brought the case here by writ of error.

Mr Browning, district attorney, for the United States.

Mr , for claimant.

MR JUSTICE MILLER.—This is a writ of error to the district court. The property which is the subject of this controversy was seized for a violation of the internal revenue laws. Robeson Brothers filed their claim as the owners of the property, denying its liability to condemnation. In the course of the trial, the claimants offered themselves as witnesses in their own behalf, and were admitted against the objection of the district attorney. The ruling of the district court upon this objection is alleged for error, and presents the question for our determination here.

The proviso to the 3d section of the Act of July 2, 1864 (13 Statutes at large, 351), declares, "That in the courts of the United States there shall be no exclusion of any witness on account of color, nor in civil actions, because he is a party to, or interested in, the issue tried."

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This enactment was intended to effect in the Federal courts the same change in the law of evidence as had been made by many of the States, namely, to admit the testimony of witnesses previously incompetent on account of interest, or of being parties to the suit. The phrase "civil actions" includes actions at law, suits in chancery, proceedings in admiralty, and all other judicial controversies in which rights of property are involved, whether between private parties, or such parties and the government. It is used here in contradistinction to prosecutions for crime.

The suit before us is a civil action within the meaning of the statute. It is prosecuted according to the usual course in admiralty. It is an inquiry into a right of property. The provision cited, therefore, will allow these claimants to testify, unless it has been repealed or modified by some other act of Congress.

The 2d section of the act of February 28, 1865 (13 Statutes at large, 442), enacts, that "Any officer or other person entitled to or interested in a part or share of any fine, penalty, or forfeiture incurred under this or any other law of the United States, may be examined as a witness in any of the proceedings for the recovery of such fine, penalty, or forfeiture by either of the parties thereto, and such examination shall not deprive such witness of his or her share or interest in such fine, penalty, or forfeiture." And by the 9th section of the act of July 13, 1866 (14 Statutes at large, 146), it is provided, "That whenever, in any civil action for a penalty, the informer may be a witness for the prosecution, the party against whom such penalty is claimed

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may be and shall be admitted as a witness on his own behalf."

These two acts confer upon a claimant, in this special class of cases, competency to testify. It is urged, that because they are directed to such cases specially, they should be held to operate as a limitation upon the previous general provision of the statute—that is, that they work its repeal *pro tanto*. Of course, if it were not for the general enactment, the claimant would be incompetent, except in the particular event mentioned in the special statute for that case. The common law rule would in all other cases obtain. To avoid the general statute, and continue the common law rule as operative, we must hold that the later provision repealed the earlier by implication. It is well settled that no repeal by implication will be allowed, unless it be a necessary and irresistible implication. The statutes must be so inconsistent that, if the later stands, the former must thereby fall. Such is not the case with those before us. The act of 1866 provides that a certain class of persons may be witnesses in a given contingency. The act of 1864 says that such persons shall be witnesses without regard to such contingency. They are not necessarily in conflict.

The truth seems to be, that the provision of the act of 1866 was introduced to remove the supposed advantage given to the informer by the act of 1865, in ignorance or forgetfulness of the more general enactment of 1864. It is very improbable that Congress intended to repeal or limit the effect of that act by others looking in the same direction.

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I am therefore of opinion that the act of 1864 authorized the introduction of the claimant in this case as a witness in his own behalf, although the prosecutor was not sworn; that it is not repealed or modified by the subsequent acts referred to.

The judgment of the district court is affirmed.

Judgment affirmed.

See 2 Parsons on Shipping and Admiralty, 437, n. 4, in which a ruling of Mr Justice Clifford, in *Robinson v. Mandell*, U. S. C. C., Mass., Nov. 1868, is given upon one clause of this statute. The learned author also suggests that it is uncertain how far the rule would be adopted in Admiralty.—[*Reporter*.]

DISTRICT OF IOWA.

OCTOBER TERM, 1867.

Before Mr JUSTICE MILLER *and* Mr DISTRICT JUDGE
LOVE.

UNITED STATES *v.* GLEASON.

I. WHEN OFFICER WITHIN PROTECTION OF ACT OF FEBRUARY 24, 1864 (13 U. S. Statutes at large, 6).—

1. *Seeking assistance.*—Parties employed by proper officers to arrest deserters, when, having come into a vicinage on such service, they are returning therefrom to another place, to obtain assistance to effectually discharge their duty, are employed in arresting deserters within the meaning of the act of 24th February 1864.

2. *When not making arrest.*—It is not necessary that such parties be, at the time, in the immediate act of making an arrest.

3. *Purpose of act.*—The purpose of the act is to protect the life of the person so engaged, and this protection continues so long as he is employed in a service necessary and proper to the discharge of his duty in that behalf.

4. *No judicial discretion.*—Parties charged by proper officers with the duty of arresting persons especially named, as deserters, cannot make their obedience to their orders dependent upon any inquiry on their part, whether the persons to be arrested be, in fact, deserters or not.

5. *Not dependent upon guilt.*—The protection which the law affords to parties executing it, does not depend upon the legal guilt of the persons charged as deserters.

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II. WHEN A PARTY IS GUILTY UNDER THE ACT.—

1. *Officers off Duty.*—If a person assault parties charged with this service when they are not engaged therein, he is not amenable to the Federal laws, however malicious the deed may be, and even though it result in death.

2. *Motive.*—In order to the guilt under this act of the person making the assault, he must be moved thereto by some motive having relation to the service in which the party assaulted was engaged.

3. *Casual rencounter.*—It is not enough that the offence was committed in a casual rencounter, which would have occurred if the person assaulted had not been engaged in that service.

4. *Aiding and abetting.*—It is not necessary that the accused should have personally made the assault. It is enough if, with the spirit above mentioned, he brought it about, or aided in bringing it about.

III. WEIGHT OF DYING STATEMENTS OF PERSONS KILLED, AND OF STATEMENTS OF ACCUSED.—

1. *Statements made while in extremis.*—The character of the dying statements of a person who has been killed, their consistency with established facts, and all the circumstances of the dying man, are to be considered by the jury in determining the weight to which his account of the transaction is entitled.

2. *Statements of accused.*—If a person, knowing himself to be suspected of a crime, makes contradictory statements with reference to it, the fact has not the effect, as in the case of an ordinary witness, of neutralizing his testimony.

3. *Withholding truth.*—It is reasonable to assume that if such person withholds the truth, he does so because it is unfavorable to his innocence.

4. *Contradictory statements.*—The effect of statements made by a party against his interest, cannot be avoided by contradictory statements.

IV. OF REASONABLE DOUBT.—

1. *Rule.*—Before finding a defendant guilty of murder, the jury should be satisfied of his guilt beyond a reasonable doubt.

2. *Frivolous Doubt.*—Such doubt is not every possible doubt, however slight, or however unfounded, such as beset some minds on all occasions.

3. *Rationally founded.*—It should be founded on something

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connected with the case, as disclosed by the testimony, which leaves in the mind a rational uncertainty as to guilt not removed by any other matter in the testimony.

THIS was the trial before the court and jury of the defendant upon an indictment for murder.

The provost marshal of the United States army, for the district of Iowa, with headquarters at Grinnell, in that State, employed J. L. Bashore and J. M. Woodruff to arrest Samuel Bryant, Joseph Robertson, and Thomas C. M'Intire, as deserters from the service. While proceeding on this service, these officers were met by the defendant, who expressed a willingness to aid them in their employment. He went at once to the place where the alleged deserters were. On the way, he declared to all persons whom he met his hostility to the law, and to the execution of it by the officers, whom he declared his readiness to kill. A large and excited crowd collected, and the officers, being unable to secure the deserters, started on their return to headquarters to procure the force necessary to execute the law. They were followed by the accused and two other persons, were overtaken, and killed.

Mr Browning, district attorney, for the government.

Mr Severe, for the defendant.

MR JUSTICE MILLER.—Gentlemen of the jury,—After several days of patient and careful investigation in this case, and after the able arguments of counsel for the government and for the prisoner, it becomes the duty of the court to give you a statement of the law which

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should govern you in deciding concerning the guilt or innocence of the accused.

Section 12 of the act of Congress of February 24, 1864, under which the defendant is indicted, was passed for the purpose of protecting the lives and persons of the officers and agents of the government, when engaged in the discharge of the duties by that act imposed. Experience had proved this to be a dangerous service, on account of a disposition on the part of evil-disposed persons in various parts of the country to resist the due enforcement of the law for calling out the military force of the nation. That section, so far as applicable to the case before us, enacts, that if any person shall assault, obstruct, hinder, or impede any officer or other person employed in arresting or aiding to arrest any spy or deserter from the military service of the United States, if such assaulting, obstructing, hindering, or impeding shall produce the death of such officer or other person, the offender shall be guilty of murder, and upon conviction thereof, shall be punished with death.

The defendant, Michael Gleason, is charged, in various forms, in this indictment, with assaulting J. L. Bashore and J. M. Woodruff, with intent to hinder and obstruct them while they were engaged in the business of arresting Samuel Bryant, Joseph Robertson, and Thomas C. M'Intire, who were deserters from the military service of the United States; and that said assault occasioned the death of the said Woodruff and Bashore.

Upon the question whether Bashore and Woodruff were killed by a violent assault made upon them at the

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time and place alleged in the indictment, you can experience no difficulty.

You are next to determine whether they, or either of them, were employed in arresting, or aiding to arrest, Samuel Bryant, Joseph Robertson, and Thomas C. M'Intire, or either of them, as deserters from the military service of the United States, when this assault was made.

Upon the subject of their employment, you have the records of the provost marshal's office of the district in which the transaction occurred, and their statements of the business in which they were engaged, as declared by themselves to the prisoner, and as detailed by the prisoner to various persons. It is claimed by the counsel for the defendant, that if the parties killed had been so engaged, and had come to that neighborhood with the purpose of arresting the supposed deserters, but at the moment of the assault, had abandoned the intention of making the arrests at that time, and were returning to headquarters at Grinnell, with a view to making other arrangements for arrest at another time, they were not so engaged as to bring the case within the law. But this is not a sound construction of the statute. The court instructs you, upon that point, that if the parties killed had come into that neighborhood with intent to arrest the deserters named, and had been employed by the proper officer for that service, and were, in the further prosecution of that purpose, returning to Grinnell with a view to making other arrangements to discharge this duty, they were still employed in arresting deserters within the meaning of the statute.

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It is not necessary that the party killed should be engaged in the immediate act of arrest; but it is sufficient if he be employed in and about that business when assaulted. The purpose of the law is to protect the life of the person so employed, and this protection continues so long as he is engaged in a service necessary and proper to that employment. The counsel for the defendant also asks in this connection, that the court shall instruct you that the persons whom Bashore and Woodruff were employed to arrest, must be proved clearly to have been deserters, before you can find the defendant guilty.

This instruction we must refuse. If those officers were ordered by their superiors to arrest persons specifically named as deserters, they were bound to use their best efforts to execute their orders. They had no right to make their obedience dependent upon any inquiry which they could make as to whether the persons to be arrested were deserters or not. The protection which the statute intended to throw around those officers does not depend upon the legal guilt of the parties charged with desertion. If it were so, the jury would be required to try two issues of guilt or innocence, depending upon totally different transactions, and involving parties not before the court. Such a construction would defeat the manifest intention of the law. We have only to suppose that Congress intended that if persons who were engaged in arresting parties as deserters were killed as in the act set forth, the one committing the offence should be guilty of murder. This makes the language of the act consistent with its manifest purpose. In giving it this construction we do no violence to the language of the

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statute, and are fully supported by the necessity of giving effect to its spirit and meaning.

It is therefore not essential to conviction to prove that, in point of law or fact, Bryant, Robertson, and M'Intire were deserters.

If you find, in investigating this branch of the subject, that Woodruff and Bashore, when they were assaulted, were not employed in arresting or aiding to arrest deserters, then, according to the principle already stated, however wicked and malicious may have been the act of homicide, the defendant must be acquitted; the laws of the Federal government do not reach his case, and he is amenable only to the laws of the State of Iowa.

But if you are of opinion that the parties killed were employed in arresting deserters, as charged in the indictment, according to the rules which we have stated to enable you to determine that fact, you will then inquire into the connection of the defendant with the transaction.

On this subject you are instructed that, in order to find this person guilty, it is not enough that you should find that the assault was a mere casual rencounter, which would have taken place all the same, if the persons killed had not been employed in a business relating to the enrolment, or to the arrest of deserters. You must find that the assault was prompted by some motive which had relation to the service in which the deceased was engaged, and grew out of hostile feelings engendered thereby.

You must also find that the accused contributed to the assault with this motive or sentiment. You must find that he, with such feelings, or with the object of obstructing or hindering persons engaged in the discharge of

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the duty of arresting deserters, actually and personally assaulted them, or one of them ; or by some active means efficiently aided in bringing about the assault which resulted in the homicide.

It is not necessary to the defendant's guilt that he should have made the assault personally. If, with the motive above mentioned, he intentionally brought about, or assisted in bringing about, the assault in which the deceased were killed, it is the same as if he had made it himself.

If, on the other hand, he had no design or intention to hinder or obstruct these officers in the discharge of their duties, or if he was present by mere accident when the assault was made, and took only such part in the affair as he might reasonably do for self-defence, then he is not guilty.

The testimony which tends to develop the prisoner's connection with and relation to the transaction which resulted in the death of these officers, is largely composed of the dying declarations of Bashore, and of statements alleged to have been made by the prisoner himself. In both cases, these statements come to the jury through witnesses who profess to have heard them. With regard to them both, you are to consider the imperfection of human memory, and the lapse of time since the conversations occurred which are detailed ; and you are also, in reference to any discrepancies in the detail of these conversations by the witnesses who heard them, to remember how seldom it is that every person present hears or remembers all that is said, or receives precisely the same impression from hearing the same conversation.

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Bashore seems to have been fully aware of his approaching dissolution, and to have made his statements with a full sense of the awful responsibility of his situation. It is true that the absence of cross-examination leaves out an important agent in ascertaining all the truth, but it is equally true that in his situation there seems to be nothing to detract from the probability that he desired to tell nothing but the truth. The clearness or obscurity of his statements, their consistency with each other, and with other facts proved in the case; the condition of his mind for accurate observation and for correct recital of the things observed; and as well, also, the fact that he is the only person, except the defendant, whose story of the immediate occurrences at the time of the homicide is known to us,—are all to be considered by you in determining the degree of credit to which his testimony is entitled. Of the importance of these statements there can be no doubt. The weight to be given them, in your estimation of the whole case, is for you, and not for the court, to determine.

The accounts of these transactions, given by the prisoner at various times, differ from each other, and are, in some important particulars, contradictory; and the statements of what he did say are not always identical when detailed by different witnesses who profess to have heard them. Considering the lapse of time, and the exciting nature of the occasion, it is not remarkable that the witnesses should vary somewhat in their recollection of what was said.

The defendant, however, was aware that he was suspected of the murder, and was under no obligation to

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make any statement about the matter. The fact that he voluntarily made contradictory statements, cannot, as in the case of an ordinary witness, have the effect merely of neutralizing his testimony, as is contended by his counsel. On the contrary, the jury must be left to draw such inference from it as, in view of all the circumstances, may seem just. It is reasonable to assume that if he withheld the truth, he did so because it might not be favorable to his innocence.

It is also to be considered that when a party has voluntarily made statements against his own interest, which are always entitled to great weight, he cannot, by subsequently contradicting them, or by varying his account of the transaction, destroy the effect of such admissions. Nevertheless, the general looseness, inaccuracy, or contradictory character of the defendant's accounts of the transaction, may be taken by the jury for what they may be worth, as affecting the credence to be given to any part of his story.

Before you find the defendant guilty, you should be convinced of his guilt beyond a reasonable doubt. But it is not every possible doubt, however slight or however founded, which should prevent a verdict of guilty. The doubt, to have that effect, must be a reasonable one; that is, it must be founded on something growing out of the state of the testimony, which leaves a rational uncertainty as to his guilt, and which nothing else in the case removes. The degree of conviction in the minds of the jury of the guilt of the prisoner, should be something more than a bare preponderance of belief; something more than the probability of guilt merely out-

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weighing the probability of innocence. The mind should be able to rest reasonably satisfied of the guilt of the accused before a verdict of that character is given. On the other hand, mere possibilities of innocence, the doubts, however unreasonable, which beset some minds on all occasions, should not prevent such a verdict.

If the whole testimony in the case produces in your minds this degree of conviction of the guilt of the prisoner, it is your duty to say so by your verdict. If it does not, it is your duty to say Not guilty.

The jury retired, and after an absence of about one hour, returned with a verdict of "Guilty." At the request of the defendant's counsel, the jury were then polled, and each juror answered the usual question affirmatively. The convict was remanded to prison.

Thereafter, being called to receive his sentence, he spoke for some minutes, professing to detail his connection with the death of Bashore and Woodruff, and declaring his innocence in the premises. Judge Miller then pronounced sentence, as follows:

Michael Gleason, you are charged at this bar, and before the country, with the crime of murder. A jury of honest and faithful men, after a full and fair investigation of your case, have said that you are guilty. You have had three years to prepare for this trial, and to secure, at the expense of the government, all the testimony which you could find in your behalf. You have had the aid of able, experienced, faithful, energetic counsel, who have done all that could be done in your defence. You have had a fair, an impartial, and conscientious trial.

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I have myself no doubt of your moral and legal guilt ; and I feel authorized to say that the judgment of my associate, who has been with me through the trial of the case, concurs with mine.

You met these two men, who confided to you their purpose to arrest deserters. You went immediately to a place in the neighborhood, where these deserters were, with a large crowd of other persons, many of whom were doubtless known to you as sympathizing with them. On your way you published to every person you saw, the presence of these officers in the neighborhood, and the object of their visit. You declared on each occasion your hostility to their purpose, and your readiness to join in resisting, even to death, although you had professed to them that you would assist them.

When you reached the crowd, you proclaimed aloud in the hearing of all, the presence of these men, and the object of their visit ; and declared that you would be one of three men to take or kill them. Very shortly after this, you and two men of desperate character left the crowd, going in the same direction, and about the same time. You were next seen lying beside one of your victims, with your gun broken over his head ; your pistol on the ground freshly discharged ; and your other victim dead a few rods off.

You were one of the three who killed those men, as you said you would be ; and you killed them without any cause of offence against them personally. Your only motive was hostility to the law which they were charged to enforce.

You are not a native of this country, but, as your

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counsel have stated, you had taken an oath that you were favorable to its government. You came from a country where men in your station in life complain, perhaps justly, that they are oppressed by laws which they have no voice in making. You have come to a country where your vote at the ballot-box is as potential in making or modifying the laws, as that of the judge who now addresses you.

Not content with this peaceable mode of changing a law which you did not like, you permitted your hostility to it to incite you to murder the persons charged with its enforcement. Your present condition is a striking admonition that this cannot be permitted in a free country any more than in a despotism.

The penalty which the law attaches to your offence is one which my private judgment does not approve; for I do not believe that capital punishment is the best means to enforce the observance of the laws, or that, in the present state of society, it is necessary for its protection. But I have no more right, for that reason, to refuse to obey the law, than you had to resist it.

I therefore do pronounce upon you its sentence: That you be committed to the custody of the marshal of this district, by whom you shall be held in close imprisonment until the 27th day of December next; and that on that day you be hanged by the neck until you are dead; and may God, the wise Governor of the universe, who is equally the Father of the judge who pronounces this sentence, and the criminal to whom it is addressed, have mercy on you.

As to statements of person *in extremis*, see 8 Wallace, 397.

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DISTRICT OF MISSOURI

OCTOBER TERM, 1867.

Before MR JUSTICE MILLER, MR DISTRICT JUDGE TREAT,
and MR DISTRICT JUDGE KREKEL.

In re THE PETITION OF WILLIAM MURPHY.

I. CONFINEMENT OF CITIZEN UNDER MILITARY SENTENCE.—

1. *Presentment by grand jury.*—A person arrested in New Orleans in 1865, charged with offences committed in Mobile in 1863, and tried at St Louis, must be discharged from confinement, in which he is held by sentence of a military commission, if the grand jury organized next after a list of prisoners so held is furnished to the judges, do not present him to the court for trial.

II. CONSTITUTIONALITY OF ACT OF MARCH 1867.—

1. *Intention.*—The act of March 2, 1867 (14 U. S. Statutes at large, 432), was intended—

(1.) To validate punishment of offenders, which would otherwise be invalid.

(2.) To protect from civil process persons who, under the President's orders, had, in striving to suppress the rebellion, rendered themselves amenable to prosecutions.

2. *First Object.*—The provision to secure the first of these objects is unconstitutional, because it is *ex post facto*.

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3. *Civil rights.*—So far as that act relates to civil rights, and affords protection against civil suits, it was within the competency of Congress. (*Per Mr Justice Miller.*)

THE petitioner, William Murphy, was charged with the commission of grave offences in 1863 at Mobile, in Alabama, and in 1864 at Memphis. He was arrested in 1864 at New Orleans, and, in 1865, at St Louis, was tried by a military commission, found guilty, and condemned to imprisonment in the penitentiary of Missouri. The President approved the finding of the commission, and issued his order that the punishment be inflicted. After he was confined under this authority, a grand jury in the Federal courts of the district had been organized and attended the term, and been discharged without a bill of indictment against the prisoner. At the succeeding term, he presented this petition for a writ of habeas corpus, directed to the warden of the penitentiary. The above facts appeared by the return.

Mr Noble, district attorney, in support of the return.

Mr Garesche, for the petitioner.

MR JUSTICE MILLER.—The prisoner is held by virtue of an order of the President of the United States, under and in conformity with the sentence of a military commission, which assembled in the city of St Louis, in the fall of 1865, upon three charges.

The first substantially charges him with having, in 1863, conspired, in the city of Mobile, Alabama, with sundry persons, to destroy, within the Federal lines, steamboats and other property.

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The second charges him with the destruction of the "Champion," at Memphis, in September, 1864.

The third charges him with the destruction of the "Mephram," between Memphis and Cairo, in September, 1864.

Upon the first two, he was found guilty, and sentenced to a servitude of ten years in the Missouri penitentiary. Upon the third, he was acquitted.

This class of questions has lately been thoroughly discussed by the supreme court, to the decision of which, this court, whatever be the individual opinions of its members, will ever pay the greatest respect. In the case decided last winter, of Milligan, Bowles, and others (4 Wallace, 2), the principles of the law relative to the trial of the citizen by a military tribunal were elaborately examined. The present, however, differs from that case in this particular—that the offences for which Milligan and his companions were tried had been committed in Indiana, where martial law had never prevailed, and where the courts were always open for the trial of offences. Here this is not the fact. The record shows that the offences for which Murphy was tried were committed, among other places, at Mobile, where the Federal courts were then closed. They were open at the time and place of his arrest, that is, at New Orleans, and also at the time and place at which he is alleged to have committed one of the offences, that is, at Memphis.

But in our view of the matter, this is unimportant here. This court must take notice of the fact that, at the time of his trial, the Federal courts had resumed their functions, and in any of them the petitioner could

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have been tried for any of the offences of which those courts had jurisdiction.

The question, then, to be decided is, whether the offence charged comes within the provisions of the act of the 3d of March, 1863.

The supreme court of the United States unanimously concurred in the opinion that the act of 1863 authorized the President of the United States by proclamation to suspend, during the then existing rebellion, the writ of habeas corpus in any portion of the United States. Previously he had exercised this power, and the contest had arisen as to whether it had been vested in him or in Congress. By this act, Congress intended to assert its own right. Conferring the authority upon the President to exercise the power, they intended to imply that they thought he did not possess it by virtue of his own functions. But the 2d section of the act limits the power conferred, and imposes conditions upon its exercise. It provided that while the President, in defence of the public safety, might arrest a person and not be required by a writ of habeas corpus to give the reason for the detention, yet such person was not to be detained beyond a limited period, unless proceedings in the courts of law were instituted against him. The Secretaries of State and of War were required to furnish to the judges of the courts of the United States a list of the names of all parties, not prisoners of war, resident in their respective jurisdictions, who then were, or afterwards should be, held in custody by the authority of the President, and were citizens of the States where the courts were open. If the grand jury organized next

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after the list was furnished, failed to find a bill against a party confined upon the President's order, it was the duty of the court to discharge him.

In the construction of this act, majority and minority opinions were given by the supreme court of the United States in the *Milligan* case (4 Wallace, 2). I quote from the opinion of the minority, rendered by Mr Chief Justice Chase :

“ Indeed, the act seems to have been framed on purpose to secure the trial of all offences of citizens by civil tribunals, in States where these tribunals were not interrupted in the regular exercise of their functions.”

The opinion of the majority of the court goes still further, and must be binding upon every member of that court, whatever be his individual opinion.

It says, “ The discipline necessary to the efficiency of the army and navy required other and swifter modes of trial than are furnished by the common law courts ; and in pursuance of the power conferred by the constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offences committed while the party is in the military or naval service. Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government ; and while thus serving, surrenders his right to be tried by the civil courts ; *and all other persons* ” (and these words are emphasized in the decision), “ citizens of the States where the courts are open, if charged with crimes, are guaranteed the inestimable privilege of trial by jury.”

This petitioner was arrested at New Orleans in 1865,
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charged with offences committed at Memphis in 1864. In both of these places the courts of the United States were open, and perfectly competent to the trial of any offences within their jurisdiction. He was tried at St Louis, in a State where the process of the courts had never been interrupted. Under the above construction of the act of the 3d of March, 1863, his discharge must be accorded to the petitioner, unless the point made by the district attorney, under the act of Congress of the 2d of March, 1867 (14 Statutes at large, 432), be valid.

That act provides as follows: "All acts, proclamations, and orders of the President of the United States, or acts done by his authority or approval, after the 4th of March, A.D. 1861, and before the 1st of July, A.D. 1866, respecting martial law, military trials by courts martial or military commissions, or the arrest, imprisonment, and trial of persons charged with participation in the late rebellion against the United States, or as aiders and abettors thereof, or as guilty of any disloyal practice in aid thereof, or of any violation of the laws or usages of war, or of affording aid and comfort to rebels against the authority of the United States, and all proceedings and acts done or had by courts martial or military commissions, or arrests and imprisonments made in the premises by any person, by the authority of the orders or proclamations of the President, made as aforesaid, or in aid thereof, are hereby approved in all respects, legalized and made valid, to the same extent and with the same effect as if said orders and proclamations had been issued and made, and said arrests, imprisonments, proceedings, and acts had been done, under the previous

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express authority and direction of the Congress of the United States, and in pursuance of a law thereof previously enacted, and expressly authorizing and directing the same to be done; and no civil court of the United States, or of any State, or of the district of Columbia, or of any district or territory of the United States, shall have or take jurisdiction of, or in any manner reverse any of the proceedings had or acts done as aforesaid; nor shall any person be held to answer in any of said courts for any act done, or omitted to be done, in pursuance of or in aid of any of said proclamations or orders, or by authority or with the approval of the President, within the period aforesaid, and respecting any of the matters aforesaid; and all officers and other persons in the service of the United States, or who acted in aid thereof, acting in the premises, shall be held *prima facie* to have been authorized by the President; and all acts and parts of acts inconsistent with the provisions of this act are hereby repealed."

If this act be valid, the prisoner must be detained.

It is evidently intended to make two provisions—the one, to validate the punishment of offenders, which would otherwise be illegal; the other, to protect from civil process the officers and others who, as subordinates of the President, have striven to put down the rebellion, but whose acts have rendered them amenable to legal proceedings.

So far as the first point is concerned, the law is unconstitutional; undoubtedly so. No clearer case of an *ex post facto* law could be framed. Its effect is to hold men in confinement for offences not punishable at the

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time they were committed, and to detain such persons in a servitude imposed by a court which had no jurisdiction to try them.

I had the honor of presenting the minority view in the cases decided last winter, generally known as the "Test Oath Cases." *Ex parte Gardand*, 4 Wallace, 382. In that opinion I entered into an exposition of the characteristics of an *ex post facto* law; and though I sought to qualify the positions held by the majority, yet, even under my views, as there expressed, this act, so far as its penalties are concerned, is clearly *ex post facto*. All laws which decree the punishment of an act not punishable at the time of its commission are *ex post facto*.

The prisoner, up to the time of the passage of this law, was certainly illegally imprisoned, because tried by and held under the sentence of a court which had no jurisdiction of his person or of his offence. If he be remanded, it will be under an act passed subsequent to his offence, and even to his conviction. Can any law be more clearly *ex post facto*? However unpleasant it may be to declare an act of Congress unconstitutional, yet, in a case so clear as this, we have no hesitancy as to our duty. We are of opinion that this petitioner is entitled to his discharge, and that the act of Congress cannot be invoked to prevent it. But while declaring the invalidity of a part of that law, I deem it my duty, speaking only on behalf of myself, and not for any other member of the court, in order to prevent misapprehension, to say, that it is not necessary to the decision of the present cause to pass upon the validity of that part of the act of Con-

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gress which gives immunity to the officers of the government. To that provision of the act, the views expressed in respect of its other provision have no application, and I am not required to pass upon it. My own impression is, however, that so far as it relates to civil rights, and affords a protection merely against civil suits, it was within the competency of Congress to protect the officers of the government, by the exercise, as in this instance, of all its power.

The prisoner will be discharged from the custody of the warden of the penitentiary. But inasmuch as the finding of the military court must be regarded by this court as *prima facie* evidence of his guilt of the grave offences with which he is charged, we will reserve the judgment until to-morrow, in order to enable the district attorney to inquire whether he should be remanded to the custody of an officer, to be sent to Tennessee or Louisiana for trial.

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DISTRICT OF IOWA.

OCTOBER TERM, 1867.

*Before Mr JUSTICE MILLER and Mr DISTRICT JUDGE
LOVE.*

THE CLINTON BRIDGE.

I. EFFECT OF A STATUTE ON PENDING LITIGATIONS.—

1. *An act declaring a bridge a lawful structure*, pending a suit to have it declared a nuisance, has the effect to remove the ground of complaint made against it.

(1.) *By its own terms it seems to do so*; for it describes it as a bridge already erected, and Congress must have known of the complaints made against it.

(2.) *It removes the objection.*—It makes lawful the bridge which was before unlawful; and the court must be governed by the law as it is when it is called upon to act.

II. SUCH A LAW IS NOT UNCONSTITUTIONAL.—

1. *Effect of Treaties.*—A law declaring lawful a bridge over the Mississippi, which obstructs the navigation of the river, is not unconstitutional because of the treaty with France, by which its free navigation is secured.

(1.) *Argu.*—Such questions are international and political in their character, and belong to the executive and legislative departments of the government.

2. *The Commercial clause.*—A law authorizing such a bridge to be built, and prescribing general rules for its construction and maintenance, is a regulation of commerce, and is within the powers conferred on Congress by the commercial clause of the constitution.

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(1.) *Argu.*—It was so held in the Wheeling Bridge case, 18 Howard, 421.

(2.) *Argu.*—Any means by which passengers and merchandise are transported is an element of commerce.

(1.) This has been repeatedly held in respect of navigation, and Congress has legislated on the subject accordingly.

(2.) The railroad, as much as the steamboat, is a means of interchanging persons and property, which interchange is commerce itself.

(3.) *Argu.*—When railroads become portions of the great highways of our Union, acting an important part in a commerce which embraces many States, to regulate them is to regulate commerce.

(4.) *Argu.*—This is true of a bridge over a great river for the passage of such railroad.

3. *Interference with jurisdiction of court.*—The act is decisive of the case, because it furnishes a rule by which the action of the court is determined, not because it deprives the court of jurisdiction.

THIS was a bill in chancery, filed by Gray on the 2d day of March, 1861, complaining of a bridge across the Mississippi river, on the ground that it presents a serious obstruction to the navigation of that river, and asking its abatement as a nuisance.

The authority to build the bridge was derived from the State of Illinois, by an act incorporating the Albany Bridge Company, and from the State of Iowa, under its general law on the subject. On the Iowa side of the river, it was located at Clinton. To that point, from Chicago, a railroad was built and operated by the Chicago and North Western Railroad Company. Thence west to Cedar Rapids in Iowa, ran the Clinton and Cedar Rapids Railroad, which was already constructed and being operated; and from Cedar Rapids to Omaha, in Nebraska, the Cedar Rapids and Missouri River Rail-

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road was in process of construction. At Omaha, the last mentioned road would, when completed, connect with the Union Pacific Railroad. So that from Chicago, through Illinois, Iowa, and Nebraska, a large and important commerce was being opened and carried on, all of which crossed the Mississippi upon this bridge.

The defendant's answer to the bill came in on the 7th of November, 1864, and very voluminous proofs touching the business done at this point, the manner of the construction of the bridge, its effect upon the river and the navigation thereof, were taken. The testimony having been closed, the cause was set down to be heard upon pleadings, proofs, and exhibits.

The cause being in this attitude, on the 27th day of February, 1867, Congress passed an act declaring the bridge a post route, and lawful structure as follows :

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the bridge across the Mississippi river erected by the Albany Bridge Company, and the Chicago, Iowa, and Nebraska Railroad Company, under the authority of the States of Iowa and Illinois, between the towns of Clinton, Iowa, and Albany, Illinois, shall be a lawful structure, and shall be recognized and known as a post route, upon which also no higher charge shall be made for the transmission over the same of the mails, the troops, and the munitions of war of the United States, than the rate per mile paid for their transportation over the railroads or public highways leading to the said bridge.

"Sec. 2. And be it further enacted, That the draw of

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said bridge shall be opened promptly, upon reasonable signal, for the passage of boats whose construction shall not be such as to admit of their passage under the permanent spans of said bridge, except when trains are passing over the same; but in no case shall unnecessary delay occur in opening the said draw during or after the passage of trains.

“Sec. 3. *And be it further enacted*, That in case of any litigation hereafter arising from any alleged obstruction to the free navigation of said river, the cause may be tried before the circuit court of the United States of any State in which any portion of said obstruction or bridge touches.

“Sec. 4. *And be it further enacted*, That the right to alter or amend this act, so as to prevent or remove all material obstructions to the navigation of said river, by the construction of said bridge, is hereby expressly reserved.” 14 U. S. Statutes at large, 412.

The defendants now moved the court to dismiss the bill, on the ground that this act took away its jurisdiction to determine the questions involved in it.

Mr Howe, for the motion.

Mr Grant and *Mr T. D. Lincoln*, *contra*.

MR JUSTICE MILLER.—This is a bill in chancery to procure the abatement of the bridge as a nuisance, on the ground that it presents a serious obstruction to the navigation of the Mississippi river. The pleadings are at issue, the depositions all taken, and the case set down for hearing.

The defendants now present a motion to dismiss the bill

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for want of jurisdiction. This motion is founded on the act of Congress of February 27, 1867 (14 U. S. Statutes at large, 412), which, it is claimed, takes away the jurisdiction of the court to proceed further in this case.

The complainant, on the other hand, maintains, that the act, rightly construed, does not dispose of the present suit; and that, if its true construction has such effect, it is unconstitutional. It is said, that because the 3d section provides for litigation about the bridge after the passage of the act, and vests jurisdiction thereof in the circuit courts, Congress could not have intended to conclude the question raised by this bill, which was then pending. But the 2d section of the act makes certain regulations concerning the use of the draw in the bridge, and contemplates that suits may grow out of their neglect or violation. It is to this litigation that the 3d section seems most naturally to refer. At all events, it is a species of litigation to arise after the passage of the act, to which alone that section, by its own terms, can apply.

The 1st section of the act, after describing a bridge already erected across the Mississippi river at Clinton, declares, that "it shall be a lawful structure, and shall be recognized and known as a post route." It cannot be doubted that Congress was aware of the existence of the bridge, and that it had been complained of as an unauthorized and illegal obstruction to navigation. Undoubtedly, by this act Congress intended, so far as it had the power, to remove therefrom the objection of illegality and want of authorization. The declaration that it shall be a lawful structure admits of no other

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interpretation. The language is almost identical with that used by the same body in reference to the Wheeling bridge, where the supreme court has held that such was its intent (18 Howard, 421).

But it is not necessary to determine whether Congress intentionally referred to this suit at the time of passing the act, or whether it was aware that such a suit was pending. If it had the power to make this bridge lawful, which before was unlawful, it has done so in this case; and the court must be governed by the law as it exists at the time when it is called upon to act.

The objections taken to the constitutionality of the act are these :

1. That it violates the obligations of certain treaties between the United States and foreign nations, which in effect declare that the navigation of the Mississippi river shall remain free and unobstructed for ever.

2. That no power exists in Congress to authorize or regulate bridges over the navigable streams of the United States.

3. That such special legislation, while a suit is pending in the courts involving the same matter, is an invasion of the rights of the judicial department of the government, as secured by the constitution.

1. In reference to the first of these objections, we need not inquire whether the treaties referred to were designed to affect such cases as the one before us or not; for we are of opinion that whatever obligation they may have imposed upon our government, the courts possess no power to declare a statute passed by Congress and, approved by the President, void, because it may vio-

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late such obligations. See "The Amiable Isabella," 6 Wheaton, 1.

Questions of this class are international questions, and are to be settled between the foreign nations interested in the treaties and the political department of our government. When those departments declare a treaty abrogated, annulled, or modified, it is not for the judicial branch of the government to set it up, and assert its continued obligation. If the court could do this, it could annul declarations of war, suspend the levy of armies, and become a great international arbiter, instead of a court of justice for the administration of the laws of the United States. See *Georgia v. Stanton*, 6 Wallace, 50.

2. The second of these objections involves the consideration of the commercial clause, as it is appropriately called, of the constitution.

If the determination of the circumstances under which a bridge may be built over a navigable stream, or the prescribing of general rules for its construction and maintenance, be a regulation of commerce, either with foreign nations or among the States, then the enactment under consideration falls within the powers conferred on Congress by that clause.

It would be sufficient, in this court, to say that we are concluded on this question by the decision of the supreme court in the *Wheeling Bridge* case, already referred to, in that part which expressly holds that the power to declare such a bridge a lawful structure is included within this clause of the constitution.

That case was decided when it was first before the supreme court in 1852, and is reported in 13 Howard,

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518. Its circumstances at that time were briefly these : A bridge over the Ohio at Wheeling being in process of construction, the State of Pennsylvania, alleging certain circumstances in which the bridge would operate to its special injury, commenced an original suit in the supreme court to have the structure declared a nuisance, and as such its erection enjoined, and it abated. Thereupon the State of Virginia passed an act declaring it lawful, and the validity of this enactment, among other things, was drawn in question. The court found that the State legislation conflicted with that of Congress regulating commerce upon the river between the different States, adjudged the bridge a nuisance, and that it should be abated. Afterwards Congress passed an act declaring the bridge a lawful structure, and a post road for the passage of the mails of the United States. A bill being filed to carry the former decree into execution, an injunction was allowed by Mr Justice Grier against the renewal of work on the bridge, which being disregarded, motions were made in the court at its December term, 1858, for attachment for contempt, and for sequestration ; and a counter motion to dissolve the injunction. This brought up the question of the validity and effect of the act of Congress. The opinion delivered by Mr Justice Nelson is found in 18 Howard, 421. On the subject of the competency of Congress under the commercial clause of the constitution to pass the act, he says : " Since, however, the rendition of this decree, the acts of Congress already referred to have been passed, by which the bridge is made a post road for the passage of the mails of the United States, and the defendants

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are authorized to have and maintain it at its present site and elevation, and requiring all persons navigating the river to regulate such navigation so as not to interfere with it.

“ So far, therefore, as this bridge created an obstruction to the free navigation of the river, in view of the previous acts of Congress, they are to be regarded as modified by this subsequent legislation; and although it still may be an obstruction in fact, is not so in the contemplation of law. We have already said, and the principle is undoubted, that the act of the legislature of Virginia conferred full authority to erect and maintain the bridge, subject to the exercise of the power of Congress to regulate the navigation of the river. That body having, in the exercise of this power, regulated the navigation consistent with its preservation and continuation, the authority to maintain it would seem to be complete. That authority combines the concurrent powers of both governments, State and Federal, which, if not sufficient, certainly none can be found in our system of government.

“ We do not enter upon the question whether or not Congress possess the power, under the authority in the constitution, ‘ to establish post-offices and post-roads,’ to legalize this bridge; for, conceding that no such powers can be derived from this clause, it must be admitted that it is at least necessarily included in the power conferred to regulate commerce among the several States. The regulation of commerce includes intercourse and navigation, and, of course, the power to determine what shall or shall not be deemed, in judgment of law,

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an obstruction to navigation; and that power, as we have seen, has been exercised consistent with the continuance of the bridge."

There was great disagreement between the judges in their views of the case, in consequence of which the authority of the decision has been much questioned. But this court is bound by the law as the majority of the judges there held it. In the supreme court this would not be the case, the judges sitting there being left to review the ground.

But I will not rest on the authority of that case alone. I think that the proposition declared in it is well founded in principle. The power to regulate commerce is one of the most useful confided to the Federal government; and its exercise has done as much as that of any other to create and foster that strongest bond of nationality—a community of interests among the States. The want of it was one of the most pressing necessities which led to the formation of the constitution. The clause has always received, at the hands of the courts and of Congress, a construction tending liberally to promote its beneficent object.

The power to regulate commerce, is the power to regulate the instruments of commerce. In the case of *Cooley v. The Board of Wardens*, the court says, that "the power to regulate navigation is the power to prescribe rules in conformity with which navigation must be carried on. It extends to the persons who conduct it, as well as to the instruments used."

Navigation is here spoken of as one of the subjects of legislation included in the power to regulate commerce.

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In this view of the subject, Congress has passed statutes regulating steamboats, their construction, equipment, officers, and crews, prescribing qualifications of pilots and engineers, limiting the number of passengers they may carry, and prescribing the signals they shall use in passing each other; in short, it has established a minute code for building and navigating those vessels. The right to do this depends wholly on the power vested in Congress to regulate commerce, and has never been disputed.

Navigation, however, is only one of the elements of commerce. It is an element of commerce, because it affords the means of transporting passengers and merchandise, the interchange of which is commerce itself. Any other mode of effecting this would be as much an element of commerce as navigation. When this transportation or interchange of commodities is carried on by land, it is commerce, as well as when it is carried on by water; and the power of Congress to regulate it is as ample in the one case as in the other. The "commerce among the States," spoken of in the constitution, must, at the time that instrument was adopted, have been mainly of this character; for the steamboat, which has created our great internal commerce on the rivers, was then unknown.

Another means of transportation, equal in importance to the steamboat, has also come into existence since the constitution was adopted. By it, merchandise is transported across states and kingdoms in the same vehicle in which it started. The railroad now shares with the steamboat the monopoly of the carrying trade. The

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one has, with great benefit, been subjected to the control of salutary congressional legislation. Is there any reason why the other should not be? However this question may be answered in regard to that commerce which is conducted wholly within the limits of a State, and which is therefore neither foreign commerce, nor commerce among the States, it seems to me that when these roads become parts of the great highways of our Union, acting an important part in a commerce which embraces many States, and destined, as some of these roads are, to become the channels through which the nations of Europe and Asia shall interchange their commodities, there can be no reason to doubt that to regulate them is to regulate commerce both with foreign nations and among the States, and that to refuse to do this is a refusal to discharge one of the most important duties of the Federal government. As already intimated, the shackles with which the different States fettered commerce in their selfish efforts to benefit themselves at the expense of their confederates, was one of the main causes which led to the formation of our present constitution. The wonderful growth of that commerce since it has been placed exclusively under the control of the Federal government, has justified the wisdom of our fathers. But are we to remit the most valuable part of it to the control of the States through whose territories it must be conducted, and to all the vexations and burdens which they may impose? And must all this be permitted, because the carrying is done by a method not thought of when the constitution was framed?

For myself, I must say that I have no doubt of the

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right of Congress to prescribe all needful and proper regulations for the conduct of this immense traffic, over any railroad which has voluntarily become part of any of those lines of inter-state communication, or to authorize the creation of such roads, when the purposes of inter-state transportation of persons and property justify or require it.

The bridge which we are now considering constitutes a part of an unbroken iron track from the Atlantic seaboard to the Missouri river, over which many thousand persons and millions of dollars' worth of merchandise are carried every year. Within two or three years, it is confidently believed, this track will be without break from the Atlantic to the Pacific ocean, and will carry the commerce of continents. Can it be seriously doubted that, in reference to this commerce, the magnitude of which we can hardly conceive, Congress can prescribe the place where the bridge shall be built, over which it crosses the Mississippi, and can make such regulations concerning its character and its use as shall be best for the commerce of the river, as well as of the road? The commerce of the river, and the commerce across the river, are both commerce among the States, and may be regulated by Congress, and when any regulation is necessary, should be so regulated.

And in these views I am confirmed by the language held by the Federal courts on this provision of the constitution. In nearly every case the question was as to the force and effect of State legislation, when it conflicted, or was supposed to conflict, with Congressional legislation. But the judges, in their opinions,

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often speak of the power of Congress under the commercial clause.

The great case of *Gibbons v. Ogden*, 9 Wheaton, 1, arose upon an act of the legislature of New York, granting to Fulton, the inventor, and Livingston, his associate, the exclusive right to navigate the waters of that State with boats propelled by steam; and the question was whether this act conflicted with the laws of the United States regulating the coasting trade. Chief Justice Marshall delivered the opinion of the court, and supported its decision by reasoning so cogent that it has never been questioned. He defines commerce in terms so comprehensive as to include within its meaning railroads, as well as steamboats, of which he is speaking. He says: "Commerce undoubtedly is traffic; but it is something more—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches; and is regulated by prescribing rules for carrying on that intercourse" (9 Wheat., 189). And again, "These words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend" (9 Wheat., 193, 194). "In regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power if it could not pass those lines. If Congress has the power to regulate it, that power must be exercised wherever the subject exists. If it exists within the States, if a foreign voyage may commence or ter-

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minate at a port within a State, then the power of Congress may be exercised within a State" (9 Wheat., 195). "The power of Congress, then, comprehends navigation within the limits of every State in the Union, so far as that navigation may be connected with commerce with foreign nations or among the several States" (9 Wheat., 197). And again, "It is the power to regulate, that is, to prescribe, the rule by which commerce is governed" (9 Wheat., 196). "Vessels," said the Chief Justice, "have always been employed to a greater or less extent in the transportation of passengers, and have never been supposed to be on that account withdrawn from the control or protection of Congress. Packets which ply along the coast, as well as those which make voyages between Europe and America, consider the transportation of passengers as an important part of their business. Yet it has never been suspected that the general laws of navigation did not apply to them." And again, "A coasting vessel employed in the transportation of passengers, is as much a portion of the American marine as one employed in the transportation of a cargo" (9 Wheat., 215, 216).

The United States *v.* Coombs, 12 Peters, 72, was an indictment under the act punishing thefts of goods belonging to vessels in distress, although committed above high-water mark. Upon the question of the competency of Congress to pass such act, Mr Justice Story, delivering the opinion of the court, said, "But we are of opinion that under the clause of the constitution giving power to Congress 'to regulate commerce with foreign nations, and among the several States,' Congress possessed the

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power to punish offences of the sort which are enumerated in the 9th section of the act of 1825, now under consideration. The power to regulate commerce includes the power to regulate navigation, as connected with the commerce of foreign nations, and among the States. It was so held and decided by this court, after the most deliberate consideration, in the case of *Gibbons v. Ogden*, 9 Wheat., 189-198. It does not stop at the mere boundary line of a State, nor is it confined to acts done on the water, or in the necessary course of the navigation thereof. It extends to such acts done on land, which interfere with, obstruct, or prevent the due exercise of the power to regulate commerce and navigation with foreign nations, and among the States. Any offence which thus interferes with, obstructs, or prevents such commerce and navigation, though done on land, may be punished by Congress, under its general authority to make all laws necessary and proper to execute their delegated constitutional powers."

In *Corfield v. Coryell*, 4 Washington's C. C. Rep., 371, Mr Justice Washington, in the course of his opinion, said, "The first question is, whether this act, or either section of it, is repugnant to the power granted to Congress to regulate commerce. Commerce with foreign nations, and among the several States, can mean nothing more than intercourse with those nations, and among those States, for purposes of trade, be the object of the trade what it may; and this intercourse must include all the means by which it can be carried on, whether by the free navigation of the waters of the several States, or by a passage over land through the States, where such

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passage becomes necessary to the commercial intercourse between the States. It is this intercourse which Congress is invested with the power of regulating, and with which no State has a right to interfere."

In *Cooley v. The Board of Wardens of the Port of Philadelphia*, 12 Howard, 299, the supreme court, Mr Justice Curtis delivering its opinion, held that a regulation of pilots and pilotage is a regulation of commerce within the grant to Congress of the commercial power; and he says, "The power to regulate navigation is the power to prescribe rules in conformity with which navigation must be carried on. It extends to the persons who conduct it, as well as to the instruments used."

In *Gilman v. Philadelphia*, 3 Wallace, 713, it was held, that "The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those on which they lie; and includes, necessarily, the power to keep them open and free from any obstruction to their navigation, interposed by the States or otherwise. And it is for Congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided."

And while conceding to the States the power to authorize the construction of bridges, turnpikes, streets, and railroads, in answer to the objection that such a concession to the States would arm them with a power potent for evil and liable to abuse, it was expressly said, that "Congress may interpose, whenever it shall be deemed necessary, by general or special laws. It may

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regulate all bridges over navigable waters, remove offending bridges, and punish those who shall thereafter erect them. Within the sphere of their authority, both the legislative and judicial power of the nation are supreme. A different doctrine finds no warrant in the constitution, and is abnormal and revolutionary."

In these cases, the judges have been speaking of navigation. But the terms of the constitution are not confined to that mode of conducting commerce. Any other means of commerce are obviously within its terms, and the language of the extracts above given either distinctly state or clearly import such fact. I have shown that railways are now means of inter-state commerce as well as steamboats. Their iron tracks, extending from ocean to ocean, are no more limited by political boundaries than are the rivers which rise in one State and flow through others to the sea. Over the former, propelled by one application of the motive power of steam, roll many cars, laden with the products and fabrics of one section of the country for the supply of the wants of a distant section. Through the latter, propelled by another application of the same power, ply the steamers, laden in like manner, and discharging a like beneficent office. Where lies the difference between them? Why should not the power which regulates one extend to the control of the other?

Whatever might be my individual opinion, as a member of the supreme court, upon the proposition that the statute under consideration is an invasion of the judicial powers of this court, I am, while sitting here, bound by the decision in the Wheeling Bridge case,

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already referred to, where this question was raised and decided.

The statement of this case above shows that the interference by Congress there was even after the decree of the court. Mr Justice Nelson, considering the objection urged, that the act of Congress had the effect and operation to annul the judgment of the court, shows that the bridge was unlawful because its erection was a violation of the Federal legislation, and that when this legislation was modified, it was unlawful no longer. He says, "If, in the meantime, since the decree, this right has been modified by the competent authority, so that the bridge is no longer an unlawful obstruction, it is quite plain the decree of the court cannot be enforced. There is no longer any interference with the enjoyment of the public right inconsistent with law, no more than there would be where the plaintiff himself had consented to it after the rendition of the decree."

The act of February 27, 1867, then, in our opinion, must finally dispose of this case. But it does so by furnishing a rule of law on which it must be decided, and not by depriving the court of jurisdiction. When reached for hearing, therefore, the bill must be dismissed, not for want of jurisdiction, but on the merits. For this and other reasons the present motion cannot prevail.

Motion overruled.

The motion having been thus disposed of, the cause came on to be heard, finally, upon the record. The complainant, by his counsel, presented the depositions and

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other evidence which he had taken to support his bill, claiming that it showed that he had a special interest in the navigation of the Mississippi river at the point where the bridge was, and that the bridge was an obstruction to the navigation of the river by steamboats, and was specially injurious to him, as a navigator thereof by such boats. To the introduction of this testimony the defendants objected, because, they said, it was immaterial, since, by the act of February 27, 1867, Congress had declared the bridge a lawful structure. It was admitted that the bridge formed a link in a chain of railroads extending from Chicago to the Missouri river. The court sustained the objection, and refused to hear the proofs offered. Thereupon a decree was made dismissing the bill.

Bill dismissed.

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EASTERN DISTRICT OF ARKANSAS.

APRIL TERM, 1868.

Before MR JUSTICE MILLER *and* MR DISTRICT JUDGE
CALDWELL.

PEYTON v. BLISS.

I. THE REMOVAL FROM STATE COURTS OF CAUSES INVOLVING THE
VALIDITY OF TITLES UNDER THE DIRECT-TAX LAW.—

1. *Act of 1833 still in force: Exception.*—The provisions of the act of March 2, 1833 (4 U. S. Statutes at large, 632), relating to the removal of causes from State to Federal courts, are still in force, except as to cases arising under the internal revenue system.

2. *Direct taxes upon states.*—The act imposing direct taxes upon the States (12 U. S. Statutes at large, 294) is not within this exception.

3. *That act is a revenue law*, and therefore cases arising under it are subject to removal under the act of 1833.

4. *Cases considered.*—The Insurance Co. v. Ritchie, 5 Wallace, 541, and The City of Philadelphia v. The Collector, 5 Wallace, 720, commented on and distinguished.

AT a prior term of the court, the defendant presented his petition for the removal of a suit then pending against him in the State court, alleging that it involved the question of the validity of a title to lands, to recover which it was brought, which title he derived from a sale

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of the lands for taxes, made by tax-commissioners under the acts of 1861 and 1862; and he prayed a *certiorari* to the State court, directing the return of the record under section 3 of the act of March 2, 1833. The writ was allowed, issued, and served, and the record returned, and the cause duly entered here. The defendant now moved to dismiss the writ which he had thus procured.

MR JUSTICE MILLER.—The defendant, Bliss, filed his petition in this court at its last term, in which he stated that he was sued in the State court of Pulaski county, by the plaintiff, Craven Peyton, for the possession of certain real estate, and that his only title to said real estate is derived from a tax-sale made by the commissioner of taxes, appointed under the act of Congress of June 7, 1862 (12 U. S. Statutes at large, 422), to assess and collect the direct tax imposed by Congress in the act of 1861 (12 U. S. Statutes at large, 294), upon the State of Arkansas. He therefore prayed that a writ of *certiorari* might be issued, to remove said cause from the State court into this court, in pursuance of the 3d section of the act of March 2, 1833 (4 U. S. Statutes at large, 632). In accordance with the prayer of this petition, the writ of *certiorari* was issued, and directed to the judge of the circuit court of Pulaski county, and was duly served on him the 6th day of June last.

The petitioner now moves to dismiss the writ of *certiorari*, on the ground that it was issued improvidently, and without authority of law. The plaintiff in the State court resists the motion.

It is clear that if the writ legally issued, the plain-

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tiff in the suit cannot now be turned out of this court at the option of the party who brought him here. The only question is, therefore, whether the court had authority to issue the writ originally.

The act of March 2, 1833, under which this proceeding was instituted, was passed to enable the Federal government to collect its customs, the only species of tax then authorized, in the State of South Carolina, which State, under its nullification ordinances, was attempting to resist their collection. It was a statute of several sections, and was known in the political dialect of the day as the "Force Bill." Some of its provisions were, by their terms, temporary, but those which relate to the removal of suits from State to Federal courts, were intended to be permanent, and are now in full force, except as to cases arising under the laws known collectively as the "Internal Revenue System." By section 50 of the act to amend the internal revenue law, approved June 30, 1864 (13 U. S. Statutes at large, 218), the provisions of the 1st and 2d sections of the act of 1833 were made applicable to cases arising under that system. But this section was repealed by section 67 of the act of July 13, 1866 (14 U. S. Statutes at large, 98, p. 171), which also enacted, that the act of 1833 shall not be construed to apply to "causes arising under the internal revenue act, nor to any case in which the validity or interpretation of these acts shall be in issue."

If the act imposing a direct tax on the States, under which the petitioner's rights accrued, is an internal revenue act, within the meaning of the act of July,

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1866, then the act of 1833 cannot be applied, because the act of 1866 expressly forbids it. But that act undoubtedly had reference to the system of laws known as the "Internal Revenue System"—a series of statutes commencing in 1862, and amended and modified at every session of Congress from that time to the present. The act of 1861, on the contrary, imposed a direct tax on the States for a limited period, and has not since been extended or repeated. It is clear that the proviso to the act of 1866 must be limited to cases arising under the internal revenue system, and can have no application to cases arising under the act for assessing and collecting the direct tax.

Does the original act of 1833 apply to such cases? The 2d section of that act extends the jurisdiction of the circuit court of the United States to all cases in law or equity arising under the revenue laws of the United States, for which other provision is not already made by law. The 3d section gives to the defendant, in any suit commenced in any State court, for or on account of any act done under the revenue laws of the United States, or under color thereof, or for or on account of any right, authority, or title, set up or claimed by him under any such law of the United States, a right to remove such suit into the proper Federal court.

If the direct-tax law, under which this petitioner claims title to the property for which he is sued, is a revenue law, this case is within the terms of this statute. Any law which provides for the assessment and collection of a tax to defray the expenses of the government, is a revenue law. Such legislation is commonly referred

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to under the general term "revenue measures," and those measures include all the laws by which the government provides means for meeting its expenditures. I can imagine no definition of a government revenue which would not include all the money raised by any form of taxation. This view receives strong confirmation from the fact that the direct tax is imposed by a statute which revises and increases the duties on imports, and for the first time taxes incomes, thus embracing in one revenue law, customs, duties, direct taxes, and internal revenue. Its title is, "An act to provide increased revenue from imports, to pay interest on the public debt, and for other purposes." It is true that the act of 1833 is entitled, "An act to provide for the collection of duties and imports;" and, doubtless, imports, as a source of revenue, were mainly in the minds of its framers, as that was the only tax then authorized by Congress. But the act was prospective, and gave the right in cases arising under the revenue *laws*, in the plural, and under any such law, that is, any revenue law. Congress could not have intended to provide a permanent remedy for the evils which caused the passage of that act, and at the same time to limit its effect to revenue laws then in force. I know of no rule of construction which, if it were applicable to future laws imposing duties on imports, would make it inapplicable to future laws raising revenue by direct taxation. The latter would be much more likely to need the aid of such a statute than the former.

It is supposed that these views are in conflict with some casual remarks on this statute found in the opinions

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of the supreme court in the cases of the Insurance Co. v. Ritchie, 5 Wallace, 541, and The City of Philadelphia v. The Collector, 5 Wallace, 720. But it is obvious that the writers of these opinions had in their minds, at that time, no other revenue law than those which related to the customs, and those which were a part of the system of internal revenue already spoken of. They held that the statute was in force as regarded revenue from customs, and that by reason of the proviso to section 67 of the act of 1866, it was not applicable to cases arising under the internal revenue laws. But their attention was not called to the relation of that act to cases arising under the direct-tax law; and it would be an unsafe rule to interpret language used under such circumstances as intending to settle a principle not before the court, and in reference to a revenue law not in the minds of the writers of the opinion.

The motion to dismiss the writ of *certiorari* is overruled.

Motion overruled.

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SCHENCK v. PEAY AND BLISS, *Original Bill*.
PEAY v. SCHENCK AND BLISS, *Cross Bill*.

I. JURISDICTION IN RESPECT OF CITIZENSHIP OF PARTIES TO CROSS BILLS.—

1. *Both parties citizens of the same State*.—A cross bill will be sustained in the Federal court, where a defendant is compelled to avail himself of that mode of defence, in order to protect himself from an injustice resulting to him from the position

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in which the cause stands, although the parties plaintiff and defendant, or some of them, are citizens of the same State ; provided the defendants in such bill are already before the court, and are, as parties to the original bill, subject to its jurisdiction.

2. *Character of bill.*—The Federal court, in determining whether a bill is original and independent, or ancillary and auxiliary to a matter already before the court, does not confine itself to the line which, in chancery pleadings, divides original from cross and supplemental bills, but looks to the essence of the matter, and to principles adopted by it with reference to the question of its jurisdiction of the parties.

3. *A case where a cross bill is proper.*—S., a citizen of Ohio, filed his bill against P. and B., citizens of Arkansas. As against P., he asked that his title to the real estate, the subject of the suit, should be quieted ; and as against B., who claimed an interest in the premises, by a title the same as S.'s, he sought partition. P. filed his cross bill to have the title of both S. and B. declared void. *Held*, The cross bill is a proper mode of defence, necessary to a complete determination of the controversy brought before the court by the original bill ; it is ancillary to the main cause, and brings no new parties before the court ; it is not liable to objection by demurrer.

II. APPOINTMENT OF RECEIVERS IN CHANCERY.—

1. *It will be made on a disputed equity reluctantly.*—The court of chancery will only with great reluctance and hesitation take the possession of property from a defendant having a clear legal title thereto, when the relief sought is founded on a disputed equity.

2. *But it may be done under proper circumstances.* There is no absolute rule against it.

3. *Fatal defect in title.*—But if the party against whom the appointment of a receiver is sought has himself shown a fatal defect in the title under which he claims, he stands in a different position from a party whose legal title and possession is assailed, and who has not admitted the truth of the allegations against him.

III. EXERCISE OF STATUTORY POWERS BY A BOARD OF OFFICERS.—

1. *Statute strictly pursued.*—Proceedings *in pais*, for the purpose of divesting one person of the title to real estate, and conferring it on another, must be shown to be in exact pursu-

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ance of the statute authorizing them, and no presumption will be indulged in their favor.

2. *All must act.*—Where authority of this kind is conferred on three or more persons, in order to the validity of its exercise, all must participate or have an opportunity of participating, in the proceedings.

3. *Action of two out of three.*—The action of two out of three commissioners, to all of whom a power is confided, cannot be upheld when the third took no part in, and knew nothing of, the transaction, and had no opportunity to exert his legitimate influence in determining the course to be pursued.

4. *No board.*—A statute provided a board of three tax commissioners to assess taxes on real estate, and in case of their non-payment, to sell and deliver possession of the property to the purchaser. Three commissioners were appointed, but only two acted or qualified. *Held*, There was no board of commissioners ever in existence, the two without the third not constituting a board. The intention of Congress in requiring three was, that no less number should act.

IV. RETROACTIVE STATUTES AND THEIR CONSTRUCTION.—

1. *Power to enact.*—Congress may pass retroactive statutes, provided they are not *ex post facto*.

2. *Intention to be clearly expressed.*—But in construing statutes, for which a retrospective effect is claimed, to give them such construction, the intention of the legislature in that regard must either be expressly declared, or must appear by unavoidable implication.

3. *Statute construed.*—A statute declaring, in the future tense, that a majority of a board of tax commissioners shall have full authority to transact the business of the board, and that no proceeding of the board shall be void or invalid in consequence of the absence of one of them, refers to the exercise of the power granted for the future to a majority of the board.

4. *Past defects.*—Such a statute does not cure defects in title arising out of past transactions.

5. *Non-existence of board.*—Such act does not cure the defect of the non-existence of any tax board whatever.

THIS case came before the court upon a demurrer to the cross bill, and a motion on behalf of the

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plaintiff therein, for an injunction and a receiver. Schenck, a citizen of Ohio, filed the original bill against Peay and Bliss, citizens of Arkansas, in respect of some real estate in the city of Little Rock, in the last mentioned State, and alleged therein the following case :

Section 5 of the act of June 7, 1862 (12 Statutes at large, 422), provides, that the President of the United States, by and with the advice and consent of the Senate, may appoint a board of three tax commissioners for each of the States then in insurrection against the Federal government, whose duty it was to advance along with the Federal armies into the insurrectionary districts, and assess upon the real estate therein due proportions of the direct tax imposed upon the State under the act of August 5, 1861. The Federal forces having advanced into, and occupied the county of Pulaski, Hulings Cowperthwaite, Enoch H. Vance, and Daniel P. Tyler were duly appointed a board of direct tax commissioners for said State; but Tyler, one of the members of the board, did not qualify, nor enter upon the discharge of the duties of his office. The other two commissioners proceeded to assess the direct tax upon the lots in the county; and the time limited in the act for the payment of taxes having expired, they proceeded to offer the lots for sale at auction. The defendant Bliss became the purchaser of them, and was by said commissioners placed in possession. Bliss having sold and conveyed to Schenck an undivided fourth of the property so by him purchased, the latter, in his original bill, asks, as against the former, a decree of partition of

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the property, and as against Peay, the original owner of it, that his title so acquired may be quieted by a decree of the court declaring his rights. Peay answered this bill, and accompanied his answer by a cross bill against Schenck and Bliss. In both these pleadings he alleged, among other things, that one of the board did not join in the exercise of the authority conferred upon it by the statute, and that therefore these proceedings were void ; and also, that there were other irregularities that invalidated the sale. These irregularities were, that the levy and apportionment of the tax was 50 per cent. in excess of the amount which the law authorized the commissioners to impose, and the attaching to the neglect to pay the taxes within the time limited certain penalties of an oppressive character. Fraud is also charged in the cross bill against Bliss and one of the tax commissioners. Depositions were taken, which were used upon the motion to support the allegations of the bill. The record tends strongly to establish the following facts upon this branch of the case : Cowperthwaite, one of the commissioners, came to Little Rock in the capacity of tax commissioner sometime in the winter of 1864-5. He and Vance opened an office and proceeded to apportion the direct taxes on the real estate within the corporate limits of the city. Shortly afterwards Bliss and Cowperthwaite became very intimate. Bliss had the freedom of the office of the commissioners, and access to the tax books and papers therein, a privilege oppressively denied to others. Cowperthwaite assumed the entire management of the business of the office. Vance exercised no authority in respect thereof.

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Cowperthwaite announced that owners of property must appear, not by their agents or attorneys, but in person, to pay their taxes; and he refused generally to receive the taxes except when they were tendered by the owners of the property in person. He also caused it to be generally understood that it would be regarded a military offence by the commanding general of the department, for any one to offer to pay the taxes on property when the owner was absent, engaged in the rebellion, or was within the rebel lines. The defendant Peay in this case was in this predicament. At the time of the sale, Bliss was confessedly without means or property of his own, and he stated that the money to make the purchases was furnished him by other parties. In one instance, Bliss was requested to permit a third party to bid in, at the sale, without competition, a certain parcel of property for the owner, who was absent; to which request Bliss answered that he could not consent to do so, because he had agreed to bid it in for one of the tax commissioners. He was the chief bidder at the tax sales, his bids amounting to \$27,690, for property valued at \$209,000; the taxes upon which, after adding the penalty of 50 per cent. interest and costs, were \$460.51. The yearly rents at that time were \$27,500. No payment of any part of the bids was made by him, and yet, by virtue of writs of possession, issued to the marshal by the commissioners, he was placed in possession of the property purchased; and he paid his bids, or some of them at least, with the money which he realized from the rents of the property. Other facts were alleged, and appeared by the depositions, of

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illegal and oppressive action on the part of the commissioners toward property owners, and also gross partiality and favoritism towards Bliss. Enough has been stated to show why the discretionary power of the court, invoked upon the motions, was exercised in behalf of the plaintiff in the cross bill.

Some time after these proceedings were had, Congress passed the act of March 3, 1865 (13 U. S. Statutes at large, 502), declaring that a majority of the board of tax commissioners shall have full authority to transact all business and to perform all duties required by law to be performed by such board; and that no proceeding of any board of tax commissioners shall be void or invalid in consequence of the absence of any one of said commissioners.

The plaintiff in the cross bill asks therein a decree against both Bliss and Schenck, declaring the proceedings under which they claim the property void, and to restore him to the possession thereof.

Messrs Rice & Benjamin, and Mr Jonby, for Schenck and Bliss.

Messrs Watkins & Rose, Messrs Gallagher & Newton, and Messrs Stillwell, Wassell, & Moore, for Peay.

MR JUSTICE MILLER. — This is a bill in chancery brought by the complainant to quiet his title to certain real estate, as against Peay, and for partition thereof, as against Bliss.

The title which he asks to have quieted and confirmed, is derived from a sale for taxes levied upon the real

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estate mentioned in the bill, under the act of Congress of 1861, and the amendatory act of 1862, passed to enforce the collection of the tax in the insurrectionary districts.

The defendant Peay files his answer and cross bill, when the proceedings under which the plaintiff claims were had, in which he states that he was, and still is, the true owner of the lots in controversy; that for several reasons detailed in the answer and cross bill, the proceedings were void and conferred no title on Bliss, the purchaser at the tax sale; and that the plaintiff, who purchased from Bliss, is therefore without title. He makes Bliss, as well as the plaintiff, a defendant to this cross bill, and prays that the tax sale may be declared void, and his title quieted, and the possession of the property, which had been delivered to Bliss by the tax commissioner, restored to him. He also prays for the appointment of a receiver pending the litigation, and for other relief.

The plaintiff and Bliss filed a demurrer to this cross bill, based on the proposition that the bill cannot be entertained in this court, because Peay and Bliss are both citizens of the State of Arkansas.

If this were an original bill, brought by the plaintiff therein, as an independent measure of relief, it could not be sustained.

Bliss was the sole purchaser, at the tax sale, of the property in dispute, and the certificates of sale are in his name, and Schenck, who alleges a right in himself to only an undivided fourth part, derived his claim by purchase from Bliss. It is clear, therefore, that as between

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Peay as plaintiff, and Bliss as defendant, both being citizens of Arkansas, no original and independent suit of this character can be maintained in the Federal courts.

On the other hand, it is insisted that Schenck, who is a citizen of Ohio, and the plaintiff in the original bill, asks, as against Bliss, merely a partition of the premises, and that Peay has no interest in this branch of the case; that the principal relief sought by him is a decree quieting his title as against Peay; and that in this branch of the case, Bliss's interests consist with the plaintiff's, and that it thence appears that the interests of Schenck and Bliss are equally adverse to Peay's. It is also said that the matter of the cross bill is strictly defensive, and necessary to be presented in order to bring before the court fully the defences of the plaintiff therein to the original bill.

If this be true, the demurrer must be overruled, for it is the established doctrine of this court, that where a party defendant finds it necessary for his defence, and to prevent an injustice resulting to him from the position in which the case stands, he is at liberty to file a cross bill, if the case is pending in chancery, or an original bill, if the case is one at law, although the parties defendant to said bill, or some of them, may be citizens of the same state with himself. The only limitations to this principle are, that the bill must be necessary to the defence of the party filing the bill, and it must be filed against parties already before the court, and subject to its jurisdiction, either as plaintiffs or defendants in the original suit. *Dunn v. Clarke*, 8 Peters, 1; *Clarke v.*

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Mathewson, 12 Peters, 164; Cross v. De Valle, 1 Wallace, 1.

And in determining whether a bill is original and independent, or is ancillary and auxiliary to a matter already before the court, we are not confined to the line which, in chancery pleadings, divides original bills from cross bills and supplemental bills, but may look to the essence of the matter, and to principles which, as regards parties, the Federal courts have adopted in reference to their jurisdiction. *Minnesota Co. v. St Paul Co.*, 2 Wallace, 632; *Freeman v. Howe*, 24 Howard, 450.

The main question raised by the original bill is the validity of the title conferred by the tax sale, and the relief sought is to have that title quieted and confirmed. The cross bill refers only to matters connected with the validity of the same tax title, and prays as its sole relief, to have it set aside and declared void. In reference to the partition, the cross bill is silent, and the relief asked concerning a receiver is purely incidental to the progress of the suit, and could be had without the aid of the cross bill on mere petition. It seems to us, therefore, that the cross bill is essentially a mode of defence appropriate to the case; that it is necessary to a complete determination of the controversy brought before the court by the original bill; that it is ancillary to the main cause; and that, as it brings no new parties before the court, it is not liable to the objection taken by the demurrer.

The demurrer is therefore overruled.

The application for the appointment of a receiver is urged upon the ground that Bliss is insolvent, except as to the property held under these tax sales; that the pro-

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perty in controversy is covered with valuable buildings, is located in the city of Little Rock, and is paying large rents, of which Bliss is the recipient; that the title of defendants is not only void in law, but that the tax proceedings were accompanied by such positive acts of fraud on the part of Bliss and one of the tax commissioners, that, for these reasons alone, the sale should be held to be void. These allegations of the cross bill are well supported by depositions taken in the suit.

In reply to this, it is urged that the defendants in the cross bill are in possession of the property, under the legal title; that the questions of fraud remain to be investigated, and are denied generally by affidavit; that the defendants have not yet answered, nor been required to answer, the cross bill, because the demurrer has thus far remained undecided; that it is contrary to the rules of courts of equity to appoint a receiver when the defendant is in possession, under the legal title, and that the parties should be permitted to remain *in statu quo* until the case is decided upon the merits.

It is undoubtedly true that, where the relief sought is founded upon a disputed equity, a court of chancery will with great reluctance and hesitation take the possession from a defendant holding the clear legal title. But under proper circumstances this may be done, and there is no absolute rule against it. *Huguenin v. Baseley*, 13 Vesey Jr., 105. And if the motion before us presented a case where the legal title was in the defendants, and could be declared void only by reason of fraud in the sale, we should hesitate very much before appointing a receiver.

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The defendant in the cross bill is himself plaintiff in the original bill, and in that bill has set out in detail the facts on which his title depends, and has on that statement asked the judgment of this court as to its validity. If in this statement he has shown that the proceedings, under which alone he claims title, have conferred no title, he stands in a different attitude from a defendant whose legal title and possession are assailed, and who has admitted nothing which tends to prove the truth of the matters alleged against them.

We are of opinion that the plaintiff in the original bill has disclosed a fatal defect in his own title.

The act of June 7, 1862 (12 U. S. Statutes, 422), after directing that the President shall declare, on or before the 1st day of July thereafter, in what States or parts of States the insurrection exists, authorizes him to appoint three persons for each of said States, who shall constitute a board of tax commissioners for said State. It is made the duty of these commissioners, as the Federal armies shall advance into the insurrectionary limits, to assess upon the real estate within the districts, as they are successively occupied, the portion of the direct tax imposed on the State by the act of 1861 which that real estate should properly bear. The entire proceeding for the collection of this tax, including the sale and delivery of possession to the purchaser of the lands on which it was assessed, was confided by the law to this board.

The original bill alleges the proclamation of the President including Arkansas as an insurrectionary State; the occupation by the Federal forces of the county of Pulaski,

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in which the lots in controversy are located; and the appointment, by and with the advice and consent of the Senate, of Hulings Cowperthwaite, Enoch H. Vance, and Daniel P. Tyler, as a board of direct tax commissioners for the State of Arkansas; and then adds, "That said Tyler, one of the members of said board of tax commissioners, appointed as aforesaid, did not qualify and enter upon the discharge of the duties of his office until some time after the sale of the real estate herein-after mentioned and described for taxes." It then goes on to allege the assessment of the direct tax on the lots in question by the other two commissioners, their sale of the lots to Bliss, and that after his purchase they put him in possession.

We understand it to be well settled that where authority of this kind is conferred on three or more persons, in order to make its exercise valid, all must be present and participate, or have an opportunity to participate, in the proceedings, although some may dissent from the action determined on.

The action of two out of three commissioners, to all of whom was confided a power to be exercised, cannot be upheld when the third took no part in the transaction, and was ignorant of what was done, gave no implied consent to the action of the others, and was neither consulted by them, nor had any opportunity to exert his legitimate influence in the determination of the course to be pursued.

Such is the uncontradicted course of the authorities, so far as we are advised, where the power conferring the authority has not prescribed a different rule. 2 Kent's

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Commentaries, 293, note *a*, 633, and authorities cited there, note *b*; Commonwealth v. Canal Commissioners, 9 Watts, 466; Green v. Miller, 6 Johnson, 39; Kirk v. Ball, 12 Eng. L. & E., 385; Crocker v. Crane, 21 Wendall, 211; Dougherty v. Hope, 1 Comstock, 79, 252; *ib.*, 3 Denio, 252, 259.

The case before us goes even beyond this; for according to the statement of the bill, there never was a board of commissioners in existence until after the proceedings in regard to his title were completed. The law required three commissioners. A less number was not a board, and could do nothing. The third commissioner for Arkansas, although nominated and confirmed, did not qualify or enter upon the duties of his office until after the sale of the lots to the defendants. There was therefore no board of commissioners in existence authorized to assess the tax, to receive the money, or to sell the property. If Congress had intended to confide these important functions to two persons, it would not have required the appointment of the third. If it had been willing that two out of the three should act, the statute could easily have made provision for that contingency, as has since been done by the act of 1865.

Nothing is better settled in the law of this country than that proceedings *in pais* for the purpose of divesting one person of title to real estate, and conferring it on another, must be shown to have been in exact pursuance of the statute authorizing them, and that no presumption will be indulged in favor of their correctness. This principle has been more frequently applied to tax titles than to any other class of cases.

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We cannot presume, therefore, that Congress intended that less than three commissioners could conduct these proceedings, and still less that they intended that, in regard to the important matters confided to the board, any action should be taken when there was no legally organized board in existence.

It is said, however, that this defect is cured by section 3 of the act of March 3, 1865 (13 U. S. Statutes, 502), which declares, "That a majority of a board of tax commissioners shall have full authority to transact all business and to perform all duties required by law to be performed by such board, and no proceeding of any board of tax commissioners shall be void or invalid in consequence of the absence of any one of said commissioners." As this act was passed after the proceedings relied on by complainant as conferring title on him, we must give it a retroactive effect, in order to reach the case.

The law concerning retrospective statutes has been so much discussed in this country and in England, that it would be an affectation of learning to cite authorities upon the subject. It is undoubtedly within the power of Congress to pass retrospective statutes which do not come within the definition of *ex post facto* laws. As this prohibition of the constitution relates exclusively to criminal laws, it does not affect the power of Congress to pass such a law in regard to the matter before us. But when we are called upon to construe statutes claimed to be retroactive, the rule is firmly settled that we can only give them that effect when there is something on their face putting it beyond doubt that the legislature so intended; or, to express it in other words, the legislature

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must have expressly declared the statute to be applicable to past transactions, or the intent must appear by an unavoidable implication.

No such inference can be drawn from the statute before us. The first declaration is in the future tense, that a majority of the board shall have authority to transact business, and the second branch of the provision, that no such proceedings shall be void or invalid in consequence of the absence of any one of the commissioners, has very natural reference to the exercise of the power granted for the future to a majority of the board.

It is not by such language as this that titles defective on account of past transactions are cured. The language of a statute which so violates the rule of policy against retrospective laws, as in effect to take the title from one man and give it to another, must be much more clear and explicit in stating that intent than the one under consideration. No fair and natural construction of its terms will justify attaching to it such an effect.

But if the section we have cited could be held to have a retroactive effect, the case before us does not come within its purview; for it requires a board of tax commissioners to be in existence, and then provides that a majority of that board can act. We have already shown that, according to the allegations of the bill, no such board was in existence; that none had ever been organized when the two commissioners assessed the tax and sold the defendant's property. The act of 1865 does not pretend to hold that the sale shall be valid where there is no board in existence, where one of the commissioners

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never qualified, and where, consequently, no authority was ever vested in three which might be exercised by two.

We are therefore of opinion that the original bill shows on its face that the complainant has no title to the property which he claims, of which he is in possession, and from which he has for several years received the rents and profits. And as this showing accompanies the assertion of the legal title on which he relies to defeat the appointment of a receiver, that title can have no such effect.

As the circumstances disclosed in the depositions are all such as should incline us to use the discretionary power of the court in favor of the appointment of a receiver, the order will be made for such appointment; and also for an injunction restraining the defendants in the cross bill, Schenck and Bliss, from interfering with the receiver, or exercising control over the property, until the further order of the court.

DISTRICT OF KANSAS.

MAY TERM, 1868.

Before Mr JUSTICE MILLER.

THE UNITED STATES *v.* STAHL.

I. FEDERAL JURISDICTION IN KANSAS.—

1. *Admission to the Union.*—The United States, when it admitted Kansas into the Union, although retaining the title to the land which it then owned within the State, parted with the jurisdiction over it, so far as the general purposes of government are concerned, with certain reservations and exceptions.

2. *These reservations and exceptions were :—*

(1.) Lands of Indian tribes having treaties with the United States, which exempt them from State jurisdiction.

(2.) The right to tax lands of the United States, and of Indians.

3. *Forts not excepted.*—Forts of the United States might have been, but were not excepted.

4. *Jurisdiction within forts.*—In respect of jurisdiction within forts, Kansas is on the same footing as the original States. Her consent is necessary to the exercise by the United States of jurisdiction within them.

II. ESTABLISHMENT OF FORT ON GOVERNMENT LAND.—Whether the constitution requires the consent of the State in which it is located, as a condition precedent to the establishment and use as a fort of a place already belonging to the United States, may be doubted.

III. WITHDRAWAL OF JURISDICTION FROM STATE.—In order to withdraw from a State a jurisdiction which it has once exercised, and confer it on the general government, the consent of the

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former is a pre-requisite. This is the material point aimed at in the constitution.

- IV. JURISDICTION NOT VESTED IN UNITED STATES.—Fort Harker was, in 1863, established as a military post on government land in Kansas, and the United States has always retained the fee. In 1861, Kansas was admitted into the Union on an equal footing with the original States, with boundaries which included the lands on which the fort was established. *Held*, that the fort is not within the jurisdiction of the Federal courts, to punish the crime of murder committed therein.

THIS was a demurrer to a plea to the jurisdiction of the court. The facts fully appear in the opinion.

MR JUSTICE MILLER.—In this case the defendant is indicted for murder, alleged in the bill to have been committed in the district of Kansas, at a place under the sole and exclusive jurisdiction of the United States of America; to wit, at Fort Harker, on land occupied by the United States for a military post, and purposes connected therewith.

To this indictment, the defendant pleads to the jurisdiction of the court, alleging that Fort Harker was first established as a military post in the year 1863, under the authority of the War Department; that no purchase of the land on which it was established had ever been made by the government of the United States with the assent of the State of Kansas; and that the consent of that State had never been given in any other mode to the exercise by the Federal government of an exclusive jurisdiction over the land included within the post.

To this plea there is a demurrer, which we are now to decide.

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The State of Kansas was admitted into the Union by an act of Congress, approved January 29, 1861 (12 Statutes at large, 126), which declared that she was thereby placed on an "equal footing with the original States in all respects." This act, after describing the boundaries of the new State, excepts from its jurisdiction any territory which, by treaty with Indian tribes, is not, without the consent of such tribe, to be included within the territorial limits or jurisdiction of any State or territory, and declares that it shall not be included within said State.

In the case of the United States *v.* Ward, decided at the May term, A.D. 1863, this court held that the jurisdiction of the State over the crime of murder was exclusive of that of the Federal government, although the offence was committed on soil to which the Indian title had not been extinguished, unless it was soil occupied by one of the tribes which had treaties with the United States of the character above described. We held that the State had no jurisdiction in such territory, because it was no part of the State.

It is not claimed that Fort Harker is included within territory of the character last mentioned. Here it is insisted that because the fee of the soil was in the United States when the fort was established, and because the Federal government continued in the use and occupation of such soil as a fort, therefore the right to exercise jurisdiction in case of murder committed there vests in the United States.

It needs no argument to show that the jurisdiction of the crime of murder, or of any other offence, committed

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within the limits of her territory, must belong to the State of Kansas, except in some special cases, which, by a positive rule of law, are constituted exceptions to the general principle.

In this case the exception is claimed to rest on that provision of the Federal constitution which empowers Congress "to exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by session of particular States and the acceptance of Congress, become the seat of government of the United States, and to exercise like authority over all places purchased, by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings."

It is very obvious that the *situs* of Fort Harker does not come within the literal sense of this provision ; for it was not purchased by the United States at all, and no consent was ever given by the State legislature to its use as a fort. As the United States was already the owner of the land before the establishment of the fort upon it, and before Kansas was organized into a territory or admitted as a State, it was impossible to comply with these literal terms of the constitution, so far as the purchase was concerned. But as no purchase could be made, so none was necessary. The only object of a purchase, namely, the acquisition of a title, was already accomplished.

The government of the United States, when it admitted Kansas into the Union upon the same footing as the original States, retained the legal title to all the

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lands which it then owned in the State of Kansas. So far as general purposes of government were concerned, however, with certain reservations and exceptions, it parted with jurisdiction over it.

The first exception reserved the lands of Indian tribes which had treaties exempting them from State jurisdiction; the second, the power to tax the lands of the United States and of the Indians. It was competent to the Federal government, and it would have been appropriate at that time, to have also excepted out of this grant of jurisdiction, places for forts, arsenals, &c., if such had been the policy of Congress. But it was not done.

So far as the consent of Kansas to the exercise of this exclusive jurisdiction by Congress is concerned, that State stands on the same footing as the original thirteen.

The question then is, when Congress purchases the fee simple of a portion of territory included within one of the original States, for the purpose of erecting a fort thereon, what kind of consent is necessary to be obtained from the State legislature in order to vest jurisdiction in the Federal government?

It is not material now to inquire whether the United States could erect and occupy a fort without the consent of the legislature. The language is, that Congress shall exercise exclusive legislation over all places purchased with that consent. But whether the constitution requires that consent as a condition precedent to the establishment and use of the place as a fort, may well be doubted. It does not seem probable that the framers of

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the constitution, who conferred on Congress full powers of making war, raising armies, and suppressing insurrections, and also declared that the Federal government was established for the express purpose of providing for the common defence, would have left its power of erecting forts, so important to the execution of that purpose, subject to the volition of State legislatures. However this may be, it is clear that in order to withdraw from a State a jurisdiction which it had possessed and exercised, and confer it on the general government, the consent of the former was made a pre-requisite. This is the material point aimed at by the provision of the constitution.

All the important uses of a fort, arsenal, or magazine could be secured without the exercise of exclusive legislation within their walls; and there was manifest propriety in requiring the assent of the State to the exercise of this important and delicate power, which of right belonged to the local authority, and which could be needed by or useful to the general government only in special cases.

This jurisdiction having been vested in the State of Kansas by the act admitting her into the Union, and never divested, it cannot now belong to the United States.

The power provided for in the constitution is one of exclusive legislation. The act under which the defendant is indicted applies, in exact terms, to places only in which the United States is empowered with exclusive legislation. Moreover, the indictment describes the place as being within the exclusive jurisdiction of the Federal

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government. The question of concurrent jurisdiction, therefore, does not, and cannot arise in this case.

These views find support in many adjudged cases.

The demurrer to the defendant's plea to jurisdiction is overruled.

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BROWN, *Plaintiff in error*, v. THE UNITED STATES.

I. MODE OF CARRYING CONFISCATION CAUSES TO REVISORY COURT.

—The supreme court in *Armstrong's Foundry* (6 Wallace, 766) has held that confiscation causes are not admiralty cases, although the proceedings therein are by statute assimilated to the admiralty practice. They are, like other seizures on land, common law cases, and are to be removed into revisory courts by writ of error.

II. EFFECT OF PARDONS BY THE PRESIDENT.—

1. *Pleader bound by conditions*.—A party accepting and pleading a pardon in a judicial proceeding admits that he is bound by the conditions mentioned therein.

2. *May he plead*.—The supreme court has not formally declared its opinion upon the effect of such pardons, but in two instances of cases pending, it has permitted them to plead.

3. *Reinvestment*.—But there is no difference of opinion among the judges, that they restore forfeited property to the party dispossessed thereof by the offence so pardoned, subject to exceptions mentioned therein, and also excepting property vested, by judicial proceedings, in other parties.

4. *No adverse right vested*.—Until an order is made for the distribution, or for payment to the informer, or into the treasury of the United States, no vested right has attached, which prevents a restoration of the proceeds to the owner.

III. PLEADING A PARDON.—

1. *After property sold, but not distributed*.—A party whose property had, by the judgment of the court, been confis-

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cated and sold, but the proceeds of which had not yet been distributed, asked of the district court leave to file a petition alleging a pardon for the offences on account of which the proceedings were had, and praying an order directing payment to him of money in the hands of the marshal. That court having refused the leave, the circuit court, on writ of error, reversed its order in that behalf, with directions to receive the petition and proceed to hear the same.

ON writ of error and appeal.

Brown, having engaged in the late rebellion, became subject to the penalties of the confiscation acts, and proceedings were had by which his property had been forfeited and sold. While the proceeds of the sale remained in the hands of the marshal undisposed of by any order of the court, he presented his petition to the district court in which the process was had, alleging a pardon, bearing date after the judgment of forfeiture, granted to him by the President of the United States for the offences charged against him in the information. The pardon was expressed to be operative upon his acceptance of certain conditions therein mentioned, two of which are set forth *in hæc verba* in the opinion. The petitioner avers that he has complied with these conditions. The relief prayed for is that the proceeds of the property in the marshal's hands be paid to him. The district court refused to permit this petition to be filed. A bill of exceptions was duly taken to this and other rulings of the court, and the cause was brought to this court both by notice of appeal and by writ of error.

MR JUSTICE MILLER.—The supreme court of the United States decided, at its term just closed (Armstrong's

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Foundry, 6 Wallace, 766), after full argument and consideration, that proceedings under the acts for the confiscation of property on account of acts done or permitted in aid of the late rebellion, were not admiralty cases, although the statute required that they should conform, as far as possible, to the forms and the practice in admiralty. The court held that they were, in their essence, common law cases, like other revenue seizures on land; and that the mode of bringing such cases into a revisory court, was a writ of error. Under this ruling, this appeal must be dismissed.

The case remains, however, to be heard in this court on the matters properly presented by the writ of error. The bills of exception present several points of alleged error, some of which are mere irregularities, and others are supposed to go to the jurisdiction of the district court. In the view which I take of the case, it is only necessary to consider one of these points, that which relates to the plea of pardon.

On the 11th day of April, 1866, the plaintiff in error presented to the district court a petition, in which, among other things, he sets forth a pardon by the President for the offences which are the grounds of the proceeding against the property which is the subject of it. This pardon, he alleges, was duly accepted by him, and all its conditions complied with. Among the conditions of the pardon are two pertinent to the case before us :

1. That said Edward S. Brown pay all costs which may have accrued in any proceedings instituted or pending against his person or property before the date of the acceptance of this warrant.

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2. That the said Edward S. Brown shall not, by virtue of this warrant, claim any property, or the proceeds of any property, that has been sold by the order, judgment, or decree of a court, under the confiscation laws of the United States.

By accepting this pardon, and by relying on it in court, the plaintiff admits that the costs incurred in this case should be paid by him, and he avers in his petition that they have been paid out of the proceeds of the forfeited debts brought into court by its order. This he consents to, and relies upon as a compliance with the first condition above recited. He is, therefore, not entitled to contest the validity of these proceedings, so far as any part of the money realized from them has been appropriated to the payment of legal costs therein.

What effect, then, has the President's pardon upon his rights to the property confiscated by the decree of the district court? I do not propose in this place to consider the effect of a pardon by the President on the rights of property in such cases. It is sufficient for me to say, that the effect of such a pardon has been several times fully and ably argued before the supreme court, and that, by its order, they have, in two instances, been pleaded in that court, in cases like this, pending there on appeal or writ of error. While that court has not yet found it necessary to pass formally on the effect of these pardons, or to pronounce an opinion upon the subject, except in the case of Garland, *ex parte*, 4 Wallace, 333, which referred alone to their effect in removing disabilities of a personal character, I feel at

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liberty to state my belief that there is no difference of opinion among the justices upon the proposition that they restore to the recipients of them all the rights of property lost by the offence, unless the property had, by judicial process, become vested in other persons, subject also to such other exceptions as the pardon itself prescribes.

In the case before us, the petition of the plaintiff, which the district court refused permission to be filed, alleges that the money paid into court, or to the marshal, remains subject to the order of the court. It is my opinion that, until an order of distribution of the proceeds of the property sold is made, or until the proceeds are actually paid into the hands of the party entitled, as informer, to receive them, or into the treasury of the United States, they are within the control of the court; that no vested right to those proceeds has accrued, so as to prevent the pardon from restoring them to the petitioner. *Norris v. Crocker*, 13 Howard, 429.

The result of these views is, that the judgment or order of the district court overruling the motion for leave to file a plea of pardon is reversed. The case is remanded to that court, with directions to permit the petition of plaintiff in error to be filed; and if, upon a hearing, it should be found that he has actually been pardoned, and has complied with the conditions imposed upon him, then, after deducting the costs of the proceedings against him up to the time of his offering to file said petition, that all the property or money remaining within the control of the court under these proceedings be delivered or paid over to him; and for such other and

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further proceedings in said case as may be in conformity to this opinion.

Neither party recovers costs in this court.

Judgment reversed, and cause remanded with directions.

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DISTRICT OF MINNESOTA.

JUNE TERM, 1868.

Before Mr JUSTICE MILLER, on writ of error.

PHELPS v. CLASEN.

I. OF THE ISSUE IN INVOLUNTARY BANKRUPTCY. HOW IT IS JOINED, AND HOW IT IS TRIED—

1. *Answer to Rule.*—It is doubtful if any answer be necessary in proceedings in involuntary bankruptcy to a rule upon a debtor to show cause why he should not be declared a bankrupt.

2. *Proper Response.*—A paper simply denying the acts of bankruptcy charged, and demanding a trial by jury, is a proper response on the part of a debtor to such rule.

3. *Proof of Debt.*—On such trial, the petitioning creditor, it seems, need not make proof of his debt.

4. *By whom Petition filed.*—The petition in involuntary bankruptcy may be filed by any creditor whose debt is provable under the act.

5. *What Provable.*—Any debt existing at the time of the adjudication, although not then due and payable, is provable under the act.

II. THE STATUTE OF FRAUDS, AND PAYMENT OF ANOTHER'S DEBT.

—A promise founded on a new consideration, made to one who owes a third party, to pay the debt, is not within the statute of frauds.

III. OF BECOMING PARTIES TO AGREEMENTS.—Persons who signed a paper reciting a contract between them, naming them as the contracting parties, and referring to their intentions in separate clauses, are bound by the obligations thereby imposed, and are entitled to the rights thereby conferred, whether they understood themselves as signing as witnesses or as parties.

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IV. OF PAROL PROOF TO EXPLAIN WRITTEN AGREEMENT, AND ITS ADMISSIBILITY UNDER THE STATUTE—

1. *Of consideration.*—Parol proof may be received of the consideration of an instrument, different from the one recited in it, as well when it is signed by both parties, as when it is signed by only one.

2. *When meaning is clear.*—Parol proof is inadmissible to contradict or vary the terms of a written instrument, in which the parties have expressed a clear meaning.

3. *When it is unintelligible.*—Nor is parol evidence admissible to show what the meaning of the parties was, when the terms of the instrument, in the light of all the circumstances, remains unintelligible.

4. *Ambiguous.*—But when the instrument does not suggest what the meaning of the parties was, and when the language is susceptible of more than one meaning, and it is uncertain which is the proper construction, parol testimony is admissible of all the circumstances, showing the relation of the parties, their knowledge of the subject matter of the contract, and the state or condition thereof, and of all other facts which shed any light on their intention or meaning.

5. *Statement and Holding.*—A partner selling his interest in the firm property to his co-partner and a third party, gave a writing containing the following clause: "And it is further understood by the parties of the second part (*i.e.*, the vendees), that the above sale is made subject to any indebtedness made by the purchase of any of the before mentioned goods, wares, and merchandise, by Jennings & Phelps, and Phelps & Clasen, for which reference is made to an account of liability on the 1st day of April, 1867." *Held*, As the clause did not import a promise on the part of the vendees to pay those debts, proof of extrinsic facts was admissible, *viz.*, whether or not there were liens on the property, and what was the value of the property; and that the clause means that the vendees take the goods charged by this contract with a liability to pay, out of their proceeds, the debts mentioned.

THIS was a writ of error to the district court. Phelps filed his petition in involuntary bankruptcy to have Charles L. Clasen and A. B. Clasen, merchants, doing

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business under the firm name of A. B. & C. L. Clasen, for reasons not necessary to be here stated. The register having issued the usual order requiring them, at a day therein named, to appear before him, and show cause why they should not be declared bankrupts, according to the act, they, at the time appointed, filed before and with him a paper, informal in its character, but distinctly denying that they had been guilty of the acts of bankruptcy charged, and demanding a trial by jury. The matter being adjourned into court, a trial was had before the district judge and jury.

On the trial, Phelps, the petitioning creditor, was introduced as a witness, and testified that he had formerly been a partner in the firms Jennings & Phelps, and Phelps & Clasen,—the latter being successor to the former, and composed of himself and A. B. Clasen; that on the 1st day of April, 1867, he sold his interest in the latter firm to these debtors. He was then shown an instrument in writing, which he said was a bill of sale from himself to them; and that the goods in the store were delivered to them in pursuance of it. This paper was as follows:

“KNOW ALL MEN BY THESE PRESENTS: That I, A. I. Phelps, town of Cannon Falls, county of Goodhue, State of Minnesota, of the first part, for and in consideration of nine hundred and nine dollars and ninety cents (\$909.90) in lawful currency of the United States, to me in hand paid, at or before the ensealing of these presents, by A. B. & C. L. Clasen, of the same place, parties of the second part, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do grant and convey, unto the said parties of the second part, their executors, administrators, and assigns, the one equal and undivided one-half interest in the goods, wares, and merchandise, debts due, and demands of whatsoever nature or name

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owned by and due the firm of Phelps & Clasen, as merchants in said town of Cannon Falls. And it is further understood by the parties of the second part, that the above sale is made, subject to any indebtedness made by the purchase of any of before mentioned goods, wares, and merchandise, by Jennings & Phelps, and Phelps & Clasen, for which reference is made to an account of liabilities on the 1st day of April, 1867. To have and to hold the herein described property, to the said A. B. & C. L. Clasen, their heirs and assigns for ever.

"In testimony whereof, I have hereunto set my hand and seal this 1st day of April, 1867.

"A. I. PHELPS. [SEAL]

"Signed, sealed, and delivered in presence of

CHARLES L. CLASEN.

A. B. CLASEN."

[Five cent. revenue stamp cancelled.]

Counsel for the plaintiff then proposed to prove by the witness, that the defendants, in consideration of said sale, verbally promised that they would pay all the debts then owing by the two firms of Jennings & Phelps, and Phelps & Clasen, and that they had failed to do this, in consequence of which plaintiff had been compelled to pay said debts to the amount of \$2061.37; and asked witness several questions tending to show those facts. All these questions were objected to by defendant's counsel, and the objections sustained by the court, on the ground that the paper called a bill of sale was the sole evidence of the contract between the parties, and could not be contradicted or varied by oral testimony. After the examination was closed, the court instructed the jury, that there was no evidence to sustain the issue on the part of the petitioning creditor, and that they must find for the defendants, which they did.

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Messrs Phelps & Wilder, for the creditor.

Messrs Smith & Gilman, for the debtor.

MR JUSTICE MILLER.—The creditor complains here against the action of the district court, in the first place, because the motion which, before the trial was entered upon, he made, to have the debtors declared bankrupts, as if in default for want of an answer, was overruled.

There is no *formal* answer to the petition of the creditor, and it is extremely doubtful if any answer is necessary. Section 40 of the Bankrupt Act (14 U. S. Statutes at large, 517) directs, that on the filing of the petition, a rule shall issue to the defendant to show cause why he should not be declared a bankrupt. The response to this rule is not necessarily to be made by answer to the petition.

The next section requires, that on the return day of this rule, the court "shall proceed summarily to hear the allegations of the petitioner and the debtor;" and if at that time the debtor shall demand a jury in writing, the court shall order a trial by jury at the first term on which a jury shall be in attendance, "*to ascertain the fact of said alleged bankruptcy.*" In this case the debtor did file a written paper at the proper time, denying the acts of bankruptcy charged, and demanding a trial by jury.

I am of opinion that this paper presents a proper response to this rule to show cause, and entitled the defendants to a jury trial. There was, therefore, no error in overruling the motion of the petitioner.

On the trial before the jury, the question was raised,

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whether, in a proceeding of this nature, the petitioner must not, on the trial, and to the satisfaction of the jury, establish the existence of a debt due and payable to him from the debtors.

Looking to the language of the act, which seems to confine the inquiry "to the fact of said alleged bankruptcy," it may well be doubted whether this fact might not exist, and be found by the verdict, without regard to the further and distinct inquiry whether the petitioner had established, or had a debt provable, under the act. This view seems to be supported by the further provision of another time and another mode of procedure for that particular inquiry. See sections 22-24. If the debtor intended to deny that he owed the petitioning creditor debts to the amount of \$200, he could have raised that question before going to the jury on the alleged acts of bankruptcy. If the question were found for him, the further inquiry would be unnecessary, and the expense and delay of it would be avoided. But as this question was not distinctly made in the district court, and is not mentioned in the briefs of counsel, it is not decided here.

It is also contended, that because the plaintiff had not, at the time the principal act of bankruptcy is alleged to have been committed, paid the debt to the creditors of the firm of Phelps & Clasen, which the defendants assumed, he was not such a creditor as could file this petition against them. Any creditor, whose debt is provable under the act, is authorized to file a petition for the involuntary bankruptcy of his debtor. See section 39. And section 19 provides, that debts

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which had been incurred and were existing at the time of the adjudication of bankruptcy, whether due and payable at that time, or not due till a future day, are provable under the act. To entitle himself to this remedy, then, it was not necessary for the plaintiff to have made the payment of the debt to the firm. If his demand was a valid one, it was sufficient to support this proceeding.

It is also insisted that this testimony must be excluded, because, being a promise to pay the debt of another, the undertaking is within the statute of frauds. But this is a promise to the plaintiff, founded on a new consideration, to pay a debt which he owed to a third party. Such a promise is not within the statute.

The counsel for the plaintiff insists that the paper which is called a bill of sale is an *ex parte* instrument of the plaintiff, the main purpose of which was to transfer his interest in the partnership of Phelps & Clasen; that the defendants signed it as witnesses, and not as parties, and that consequently parol proof of their verbal promise to pay the debts of the firm is not excluded by the recital in the instrument of a money consideration. The counsel for the defendants, on the other hand, maintain that the paper is a deed signed by both parties, and that no other contract or promise on the part of the defendants than what is found in the instrument can be proven.

On this point I lay out of view the sworn statement of the plaintiff, that the defendants signed as witnesses merely, and not as parties. I am of opinion that inasmuch as the paper recites a contract between these two

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parties, naming them as such, refers in separate clauses to their intention, and shows their signatures attached, it is immaterial whether they signed as parties or as witnesses. In either case, they are shown to have made the contract which is set forth in the paper, and are bound by all the obligations which it may establish against them, and are entitled to all the rights which it confers.

It is true that nearly all the cases in which it has been decided that parol proof may be received, of a consideration different from that recited in the instrument, are where but one of the two contracting parties signed it. But the principle is not limited to that class of cases. On the contrary, in *De Wolf v. Rabaud*, 1 Peters, 476, *Sweet v. Lee*, 3 Man. & Gr., 452, and *Clifford v. Turrell*, 1 Younge & Collyer's Chancery Cases, 138, among the many which could be cited, the instrument was signed by both parties, and parol proof was admitted to sustain a cause of action founded on a consideration which was not mentioned, and was entirely different from the one which was mentioned in the instrument.

The doctrine may therefore be taken as established, that where it does not appear that the intention of the parties was to state in the instrument all the consideration passing between them, the circumstance of its being signed by both of them does not exclude parol proof of a consideration additional to and different from the one which is recited. If, therefore, no other reference in the bill of sale were made to the consideration for which the plaintiff conveyed his interest in the old firm to the defendants, than the recital of the \$909, I should have

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no hesitation in admitting the parol proof offered by the plaintiff.

But I am satisfied that the second clause in this instrument was by the parties intended to be a statement of their agreement in regard to the very matter which he desired to prove by parol. I take it that these rules of evidence are well settled :

1. Where parties have attempted to put their agreement in writing, and have upon any particular subject expressed any clear meaning, parol evidence is inadmissible to contradict or vary that meaning.

2. When the terms of the instrument, in the light of all the circumstances, do not convey a clear meaning, but remain unintelligible, parol evidence is inadmissible to show what the meaning of the parties was.

3. When the instrument does not suggest what the meaning of the parties was, and when the language is susceptible of more than one meaning, and it is uncertain which is the proper construction, parol testimony is admissible to show all the circumstances, such as the relations of the parties, their knowledge of the subject matter of the contract, the state and condition thereof, and all other facts which shed any light on their intention or meaning.

Upon these principles we proceed to examine this instrument. The particular clause upon which the question arises reads thus : " And it is further understood by the parties of the second part, that the above sale is made subject to any indebtedness made by the purchase of any of the before mentioned goods, wares, and merchandise, by Jennings & Phelps and Phelps & Clasen,

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for which reference is made to an account of liabilities on the 1st day of April, 1867."

The counsel for the plaintiff insists that this clause means that the vendees in that sale were to pay debts which the two firms had contracted for the merchandise which was the subject of the sale, and which debts were set forth in a list made on the 1st of April. But the clause, considered by itself, does not contain or express any promise by the vendees to pay those debts. If they did so undertake, their obligation in that behalf will appear only by a reference to the whole instrument and to certain extrinsic facts connected with the transaction, which must be shown by parol testimony.

The counsel for the defendants contend that the intention of the parties was, that in the sale the vendees took the goods subject to any lien thereon by way of mortgage or otherwise, existing at the time of the sale, for debts contracted in their original purchase. And they insist that if such is not the meaning, then the clause is unintelligible, and within the rule secondly above laid down.

The clause does not by its terms convey such meaning. No lien on the goods is mentioned. The law does not give a lien for goods sold and delivered, so that there is no implication that the goods were, by reason of the original purchase, charged with a lien. The sale is said to be made subject to any indebtedness contracted for the purchase of these goods, and not merely to such indebtedness as might be a lien on them. The debts referred to are to be found in an account of the liabilities of the firm, of the same date as the instrument which

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we are construing. A reference to this account is necessary to show what indebtedness is meant. The construction claimed by the counsel for the defendant would not be unreasonable if, to secure debts of the class described, there were specific liens by way of mortgage or otherwise. On the other hand, that construction would be unreasonable if there were no such liens, and the parties contracting both knew it. In order to an understanding of the meaning of the parties, it was material to know, therefore, whether there were such liens or not. And this could be shown only by parol testimony. This fact related to the condition of the property which was the subject of the sale, and must have been well known to both the contracting parties. Parol testimony to show it comes within all the decisions, as proper to elucidate the meaning of the language used in the instrument. But the question being propounded to the witness, he answered that there were no such liens. The court held it inadmissible, and ruled it from the jury. This clearly was error.

We are next to consider whether, from all the circumstances attending the parties and the matters about which they were contracting, and from the other parts of the instrument, we can deduce for this clause a reasonable and sensible meaning.

The plaintiff and one of the defendants were partners in the goods. These parties were jointly indebted on account of the purchase by them of these goods. It was in reference to this stock of goods and these debts that the plaintiff and these defendants were contracting. It was provided that the sale was made subject to any in-

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debtedness made by the purchase of the goods. What was subjected to the indebtedness? What was to be the effect of subjecting this (whatever it was) to the indebtedness?

The subject matter of the sale was all of the plaintiff's interest in the property of the partnership. This appears from the instrument itself. The value of that interest does not appear in any part of the paper. But that is a circumstance which, if it can throw light on any clause in the instrument, can be proved by parol, inasmuch as it does not contradict nor vary its terms. The defendants claim that the \$909 mentioned in the bill of sale was the only consideration which they paid, or agreed to pay, for the interest of the plaintiff. He claims that the assumption of the indebtedness contracted by the old firm in the purchase by it of the property, formed a large part of the consideration. If the interest sold by the plaintiff to the defendants was, as the former claims, worth \$3000, and this can be proven, it is unreasonable to suppose that he sold it for only \$909. If the defendants gave the fair value of the interest for it, what more reasonable than that the difference above \$900 was made up by assuming the debts for which the vendor was liable.

Now, in the light of all these circumstances, what is meant by "the sale being made subject to the liabilities of the two firms of Jennings & Phelps, and Phelps & Clasen"?

Without further verbal criticism, I may say, that if it were necessary in order to sustain the plaintiff's claim, I would hold that it means a promise on the part of the defendants to pay all such debts of the two firms as were

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created by the purchase of any of the goods conveyed by the bill of sale, and which should be found in account of liabilities taken on the 1st of April, 1867.

But it is not necessary to go quite so far. It is sufficient to interpret the clause to mean, that the defendants take the goods charged in their hands by that contract, with a liability to pay the debts mentioned out of those goods; and that for this appropriation of the proceeds of the goods, as far as was necessary, the defendants are liable to the plaintiff. This, I think, is consistent with all the circumstances of the transaction, and with the language of the contract, and is a fair and reasonable construction of it.

The defendants having disposed of the goods without applying them to this purpose, and having committed the acts of fraud and bankruptcy charged in the petition, so that the plaintiff was compelled to pay those debts, he had a right of action for the amount so paid by him.

These views of the introduction of parol testimony are well sustained, in addition to the authorities already cited, by the note of Prof. Parsons, at page 555, vol. ii., 5th edition of his work on contracts, where he gives a philosophical statement of some of the principles concerning the admissibility of parol testimony to affect written contracts.

The judgment of the district court is therefore reversed, and the case remanded to that court, with directions to set aside the verdict, and grant a new trial in consonance with this opinion.

Judgment reversed, and cause remanded for new trial.

DISTRICT OF MISSOURI.

OCTOBER TERM, 1868.

Before Mr JUSTICE MILLER, on appeal.

THE UNITED STATES v. 4000 AMERICAN GOLD COIN—ROBESON, *Claimant.*

- I. THE OBJECT OF THE 22D RULE of the trade regulations of September 11, 1863, was to prevent gold coin reaching the rebels in any manner, as well by gift, trade, or exchange, as even by being exposed to being taken by violence by them.
- II. TERMS OF RULE.—In order to attain this object, the terms of the rule absolutely prohibit the introduction of gold coin into the region declared to be in insurrection.
- III. INTENTION OF PARTY.—The intention with which a party transports gold coin into such territory, alleged to be merely to convey it to his home therein, and retain it as an investment, does not relieve the transaction from a charge of violating the rule.
- IV. GOLD COIN would at any time be held to be included within the terms "goods and chattels, wares and merchandise."
- V. AN ARTICLE OF MERCHANDISE.—At the time the 22d rule was made, the fact was, that gold coin was bought and sold as personal property, in open market, at fluctuating relations to the actual current money of the country.
- VI. EXECUTIVE MAY ACT ON IT.—It was competent for the President and Secretary of the Treasury to act on this fact in framing those rules and regulations.
- VII. JUDICIAL NOTICE OF SUCH FACT.—And even without such action on their part, the court should take judicial notice of the fact, well known to every citizen, that gold coin has ceased to be

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used in the business of the country as money, and has become an article of merchandise and traffic.

ON the 13th day of July, 1861, Congress passed an act, entitled, "An act further to provide for the collection of duties on imports, and for other purposes," the 5th section of which is as follows :

"Sec. 5. And be it further enacted, that whenever the President, in pursuance of the provisions of the 2d section of the act entitled 'An act to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions, and to repeal the act now in force for that purpose,' approved February 28, 1795, shall have called forth the militia to suppress combinations against the laws of the United States, and to cause the laws to be duly executed, and the insurgents shall have failed to disperse by the time directed by the President, and when said insurgents claim to act under the authority of any State or States, and such claim is not disclaimed or repudiated by the persons exercising the functions of government in such State or States, or in the part or parts thereof in which said combination exists, nor such insurrection suppressed by said State or States, then and in such case it may and shall be lawful for the President, by proclamation, to declare that the inhabitants of such State, or any section or part thereof where such insurrection exists, are in a state of insurrection against the United States; and thereupon all commercial intercourse by and between the same and the citizens thereof, and the citizens of the rest of the United States, shall cease and be unlawful so long as such condition of hostility shall continue; and all goods

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and chattels, wares and merchandise, coming from said State or section into the other parts of the United States, and all proceeding to such State or section, by land or water, shall, together with the vessel or vehicle conveying the same, or conveying persons to or from such State or section, be forfeited to the United States: *Provided, however,* that the President may, in his discretion, license and permit commercial intercourse with any such part of said State or section, the inhabitants of which are so declared in a state of insurrection, in such articles, and for such time, and by such persons, as he, in his discretion, may think most conducive to the public interest; and such intercourse, so far as by him licensed, shall be conducted and carried on only in pursuance of rules and regulations prescribed by the Secretary of the Treasury. And the Secretary of the Treasury may appoint such officers, at places where officers of the customs are not now authorized by law, as may be needed to carry into effect such licenses, rules, and regulations; and officers of the customs and other officers shall receive for services under this section, and under said rules and regulations, such fees and compensation as are now allowed for similar service under other provisions of law" (12 Statutes at large, 257).

And on the 11th day of September, 1863, under the authority so conferred, the Secretary of the Treasury prescribed, and the President approved "trade regulations," the 22d of which was as follows:

"22. All transportation of coin or bullion to any State or section heretofore declared to be in insurrection, is absolutely prohibited, except for military pur-

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poses, and under military orders, or under the special license of the President. And no payment of gold or silver, or foreign bills of exchange, shall be made for cotton or other merchandise within any such State or section. All cotton or other merchandise purchased in any such State or section, to be paid for therein, directly or indirectly, in gold or silver, or foreign bills of exchange, shall be forfeited to the United States."

For the forfeiture of certain gold coin taken while the claimant here was transporting the same to Tennessee, this libel was filed.

The answer of Robeson, the claimant, contained the following statement :

He resided near Memphis, and had been to St Louis. Here he had purchased the gold, and was carrying it on his person to his home when it was seized. He had purchased it as an investment, and was using it in the payment of his travelling expenses as far as was necessary. He had no purpose of using it in trade or commerce, but only to defray his personal expenses on his journey home, and in his living at home. Nor did he design to convey it to the Confederates.

The question was, whether these facts constituted a defence.

Mr Noble, district attorney, for United States.

Messrs Glover & Shepley, for claimant.

MR JUSTICE MILLER.—The claimant insists, in the first place, that the case is not within the terms of the 22d rule prescribed by the Secretary of the Treasury. He admits that he was carrying the gold from St Louis to

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Memphis without a license ; but he attempts to qualify the character of his act by claiming that it was his own money, which he was carrying to his own home, and that he was doing so as one might carry about his person the means of defraying the expenses of his journey. By these statements he excludes the idea of his transporting the coin for any commercial purpose ; and thus he claims that he committed no infraction of the rule.

The object of the rule will appear from a slight consideration of the circumstances under which it was made. The people of a large section of the country had revolted against the government, and succeeded in excluding therefrom its authority, and in establishing a government of their own, and in putting large armies in the field. It became necessary for the national government to restrict and cripple the means of the new organization for its maintenance, on every hand, and by every measure possible, and at the same time consistent with the laws of war. The rebels were compelled to provide themselves with munitions of war and other supplies necessary for its prosecution from abroad. Gold coin was the only money with which these purchases could be made. Anything which would prevent their getting such money was an efficient measure for disabling them from continuing the struggle. And this was the object of the 22d rule.

It was not a matter of consequence how the rebels should obtain the gold with which to make their necessary purchases. It was all the same to them, so far as that was concerned, whether they obtained it by gift or trade, or exchange of commodities, or by capture.

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If it were in an exposed place, where by violence they could make booty of it, their purpose was answered just as perfectly as if they sold cotton for it. What they wanted, was to get it; what the national government wanted, was to effectually prevent their getting it.

Accordingly the terms of the rule are general and imperative. "All transportation of coin or bullion to any State or section heretofore declared to be in insurrection, is absolutely prohibited, except for military purposes, and under military orders, or under the special license of the President." No exception is made here. We cannot make any. The intention of the claimant in transporting the coin into the insurrectionary district, as he has declared the same in his answer, does not relieve the transaction of the charge of violating the rule.

The claimant, in the second place, insists, that if that be the construction of the rule, the act of Congress does not authorize the Secretary to prescribe it.

The argument here is substantially the same as it was upon the just construction of the rule. On the one side, it is said, that the statute prohibits commercial intercourse, and not personal intercourse, in which the parties may carry on their persons necessary money for their private expenses. On the other side, it is urged, that all intercourse not of a warlike character is prohibited, as well that of private persons and private property for private purposes, as that of trade and commerce.

What is said above as to the object of the rule, applies equally to the statute.

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But it is further urged, that the gold coin was not "goods and chattels, wares and merchandise," which by the act are forfeited.

It does not admit of doubt that gold coin would, at any time, be held technically to be included within the terms "goods and chattels, wares and merchandise;" and especially so at the time the rule was made. Whatever was its legal character as money, it had, in point of fact, ceased to be used as a medium of exchange, and had become an article of merchandise, bought and sold in open market as such, at varying and fluctuating relations to the actual current money of the country. It was proper for the President and Secretary to ascertain and act upon this fact. This court will adopt their determination, and sustain the rule which, in their proper discretion, they have prescribed.

And even if we were not to be guided by their action, we should take judicial notice of this notorious fact. The court is not bound to shut its eyes to a fact known to every man in the United States, that one hundred nominal gold dollars are worth, in open market, two hundred dollars of the recognized currency of the country; that gold coin is no longer used in its character as money, and is a standing article of trade, and its price quoted in reports of the market as regularly and exactly as wheat or stocks.

In *Bronson v. Wiman* (10 Barb., 406), it was held that the courts will take judicial notice of the ordinary modes of transacting commercial business within the State. In *Oppenheim v. Wolf* (3 Sandf. Ch., 571), it was held that facts which are a part of the experience

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and common knowledge of the day—*e.g.*, the usual time for steam passage across the Atlantic—are legitimate grounds for the judgment of the court. In *Smith v. The New York Central Railroad Co.* (43 Barb., 225), it was said that the rule that the courts may take judicial notice of whatever ought to be generally known within the limits of their jurisdiction, includes notice of the great lines of public travel and transportation of property, and their connection with each other, and the general course of trade and transportation through the country.

In *The Bank of Augusta v. Earle* (13 Peters, 519), the supreme court of the United States said, "It is a matter of history, which this court are bound to notice, that corporations created in this country have been in the open practice for many years past of making contracts in England of various kinds, and to very large amounts."

These are all cases relating to private matters. The question here, arising upon the currency of the country, the medium not only of private exchanges, but of the measures of the government, touches the public concerns. Our right to notice such a fact of common knowledge cannot be doubted.

Whatever it once was, we know that gold coin now is an article of merchandise, and, as such, it is, when proceeding to an insurrectionary state, liable, under this act of Congress, to be forfeited.

In insisting that his intention shall be regarded as qualifying the nature of his act of conveying this gold coin to Tennessee, the claimant falls into one serious

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error. He should remember that Congress enacted this statute, and the executive prescribed this rule, at a time of great public stress, for the safety of the state. Its necessities rise above individual interests. To relieve them, it may, it often does, it must, enforce upon the citizens severe measures. At such times, before such measures, his convenience must yield. His intentions cannot qualify the rule of the state, nor protect him from the consequences, however severe, of the most innocent breach of its prohibition. With his eye fixed on his personal act, and blind to the public good, this may seem harsh; but the state is above the citizen, and its necessities are above his interests.

The judgment of the district court must be affirmed.

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Judgment affirmed.

BISSELL v. MEPHAM.

I. WHEN TWO PILOTS ARE NECESSARY, AND WHETHER MASTER MAY ACT AS ONE OF THEM—

1. *Sea-going vessels.*—The rules or practice of sea-going vessels do not require two pilots, nor preclude the master from acting as one of two pilots.

2. *Inland navigation.*—

(1.) *Adjudications.*—No case establishes a different rule in the navigation of our interior waters.

(2.) *Legislation.*—The act of August 30, 1852 (10 U. S. Statutes at large, 61), does not establish a different rule.

(3.) *Custom of insurance companies.*—The fact that insurance companies require two licensed pilots as a condition of their issuing policies on vessels navigating our interior waters

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does not create, in this respect, a public policy having the force of a law.

(4) *Requirements of voyage.*—Whether two pilots are necessary, and whether the master may act as one of them, depends upon the requirements of the voyage, and is a question simply of whether the vessel is well manned, officered, and equipped.

II. PAY OF OFFICER DOING DOUBLE DUTY—

1. *Rule sometimes held.*—The rule is sometimes held that an inferior officer, compelled, by an accident to his superior occurring during the voyage, to discharge the duties of the latter, is entitled to no additional compensation.

2. *Pre-agreement.*—This rule does not apply to the case of parties who, before the voyage, agreed for the double service of master and pilot to be discharged by one person.

III. MASTER'S LIABILITY FOR INJURY TO CARGO—

1. *The storage of the cargo*, on steamboats on western rivers, is under the special charge of the mate.

2. *By the maritime law*, the master is personally liable to the shippers, in many cases, for injury to the cargo, because, in the absence of the owners of the vessel, personal credit is given to him.

3. *As between the master and owners*, he is liable only for reasonable care and diligence.

THIS was an appeal in admiralty. It was a libel for the recovery of pilot's wages against the respondents. The facts are sufficiently stated in the opinion.

Mr Leighton, for the appellant.

Messrs Sharp & Broadhead, for the respondent.

MR JUSTICE MILLER.—This is an appeal from a decree in admiralty, of the district court for the eastern district, dismissing the libel of Bissell, the appellant.

The appeal was argued and submitted at the October term, 1867; and rather on account of the importance and novelty of the principles than of the amount of

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money involved in it, has been held under advisement until the present term.

The rapid growth of commerce, since the settlement of Idaho and Montana territories, has stimulated the use of steam navigation on 2000 miles of the Upper Missouri river, where heretofore has rarely floated anything more nautical than the fur-trader's Mackinaw. The great length of the river, flowing through an uninhabited region, thus opened to actual and useful steamboat navigation,—a navigation limited to a small portion of the year, and to vessels of light tonnage,—has given rise in the courts to questions in admiralty of much difficulty, and which, in the absence of precedent, demand great circumspection on the part of the courts in their determination.

The defendants were the owners of three steamboats engaged, in the spring of 1866, in the trade from St Louis to Fort Benton, the extreme point of steamboat navigation. One of these vessels, the "Iron City," made a voyage to that point from St Louis, which, including twenty-six days during which she was in the service of the United States government, occupied from the 16th of March to the 26th of July of the year mentioned, a period of four months and ten days. During this time, the libellant, by agreement with the owners, acted as master and as pilot, and, according to the testimony, with a single alleged exception, to be noticed hereafter, discharged fully the duties of both positions. The defendants claim that there was a special contract in regard to compensation; but we concur with the judge of the district court, that it is not established by the testimony.

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This suit is brought to recover compensation as upon a *quantum meruit*, for those services as master and pilot. The libel and the answer concur that the services, both as master and as pilot, were rendered, and that they were so rendered according to agreement made between the parties before the boat started on her voyage.

It is now argued that this contract was void, as being a violation of some principle of public policy, or of some rule of law concerning the navigation of such vessels. To sustain this proposition, no reference has been made to any rule of maritime law, to any usage, or to any decided case. The libellant was regularly licensed as a pilot. Besides him there was another licensed pilot on board all the time, whose competency is not questioned. To maintain the ground taken, it is necessary to assume that it is an established rule that two pilots are necessary to a vessel, and also that no one acting as master can fill the place of one of them. There is no such principle in the rules or usages governing the navigation of sea-going vessels. They have no regular pilots while at sea. The course of the vessel is directed by the master, who governs, if he does not actually manage, the wheel. On approaching a port, or in navigating a narrow bay or river, he takes a pilot, to whom, for the time, he surrenders his vessel. But in such case, only one pilot is required. The inference from maritime usage therefore is, that but one pilot is ever needed, and that, in the ordinary direction of the vessel, the master acts as pilot. No case has been decided, so far as we know, which establishes a different rule in regard to the navigation of our internal watercourses.

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We are referred to the act of Congress of August 30, 1852 (10 Statutes at large, 61), concerning vessels propelled in whole or in part by steam. That act contains, for the construction, equipment, navigation, and control of steam-vessels, a system both minute and comprehensive, designed to secure the comfort and safety of passengers. In a statute of this character, if anywhere, we might expect to find the rules laid down that every vessel shall have two pilots, and that no person shall act as both pilot and master at the same time. But while all pilots are required to be examined and licensed, and a penalty is imposed when any other than a pilot so licensed is employed, neither of these rules is prescribed by the act.

It would appear from the testimony of one of the defendants, that insurance companies require that a vessel should be provided with two pilots, as a condition to the issuing of policies on such vessel or her cargo. He says, that the reason for getting a pilot's license for the plaintiff, which he assisted in procuring, was to satisfy this requirement of those companies. It may be necessary to the proper manning of steamboats that, in long and continuous voyages on our inland waters, they should have two pilots; and until assured that this requirement is answered, insurance companies may very properly refuse to issue policies on such vessels. But this course of dealing, especially as it is aside from the matter of this contract, cannot create a public policy having the force of law. The advantages which these companies, and others connected with trade and commerce, such as railroad and express companies, banks, &c., have over

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the public, is already sufficient, without giving to the stipulations which, for their own protection, they insert in these contracts, or to the rules on which they conduct their business, a power equal to that of a legislative enactment. The question whether two pilots are necessary to a steamboat is not, therefore, to be settled by reference to any principle adopted by insurance companies in the conduct of their business, nor, indeed, by a regard to the reasons for such a principle, but only by a consideration of the requirements of each particular voyage. At most, the inquiry could be only whether the vessel were sea-worthy, and well manned, officered, and equipped for the service expected of her. If a boat run but from St Louis to Alton, or any other voyage to be completed in a few hours, or a longer distance with stoppages, during which he may obtain necessary rest, one pilot is sufficient; but if it be a long voyage of continuous running, then, as the navigation of our rivers requires a skilled pilot to be always at the wheel, two are necessary. So, in determining whether, there being two pilots on board, one may act as master, the real inquiry in each case is, whether the vessel, under all the circumstances, is sufficiently manned, officered, and equipped. In a trade which demands the constant care and vigilance of the captain in person—as, for instance, in voyages where the boat lands every hour or two, to receive or discharge cargo or passengers, requiring each time the attention of the master or his substitute, the mate—one man may be unable to discharge properly the duties of master and of pilot. On the other hand, in a voyage of several thousand miles, during which, between

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the points of departure and destination, the vessel may have occasion to stop only for fuel, where the crew is small, and their discipline a matter of form, the tonnage of the vessel light, and the cost of freight of necessity burdensome, it may be for the interest of all, the owner of the vessel as well as the shipper of the cargo, to place the command in the hands of one who, by performing also the duties of pilot, can curtail the expense of transportation.

Such a case is the one before us. On that ground, no valid objection to this contract is apparent.

It is, however, insisted, that the libellant, being employed as master, is entitled to no additional compensation for his services as pilot, on the ground that his duty as master required him to supply the deficiencies of all the other officers of the boat; in fact, that in serving as pilot, he was only discharging his duty as master. It is true that there are some cases which hold that when, by the death or illness of the master during a voyage, a mate is compelled to discharge the duties of his superior officer, he is entitled to no additional compensation on that account. These decisions rest on the ground that, having undertaken to discharge all the duties which might devolve upon him as mate, the new duties devolved upon him by accident were included in the undertaking, and are, in contemplation of law, paid for by his wages as mate.

The authorities are not uniform on this point, but those which hold the doctrine place it on the ground mentioned. In the case before us, however, it is agreed that the libellant and the respondents contracted, at the

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outset, for this double service. They did not, however, agree upon any price for it, nor upon any price for his services in either capacity separately. The libellant was engaged at the start as pilot as well as master, and his services were as necessary in the former as in the latter character. In fact, such services were usually valued higher than those of master. It is not, then, a case of new duty accidentally devolving upon the master by reason of his office; but it is a duty totally distinct from that of master and of a more valuable class, which, by contract made beforehand, he undertook to perform, not as part of his services as master, but as additional thereto. Under such circumstances, there does not appear to be any sound reason for refusing him a reasonable compensation for the double services which he rendered.

It remains to ascertain what should be allowed for these services. We have no positive statement of their value by any witness, except the libellant himself. He estimates them at from \$1000 to \$1200 per month. The defendant thinks \$200 or \$300 per month would be sufficient. Fortunately, there are some undisputed facts which enable us to come to a satisfactory result. Besides the parties, the only two witnesses examined are Bush, the mate, and Stone, the other pilot. They both concur in the statement that, besides discharging his duties as master, the libellant did full duty as pilot. It also appears that he was well acquainted with the river for 800 miles between Forts Union and Benton, where Stone, the other pilot, had never been. Stone, who was introduced as a witness by the defendant, also testifies that Bissell did as much piloting as he, and that he also

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faithfully did his duty as master. Stone, for his services as pilot, according to an agreement which received the approbation of the defendants before the boat left St Louis, was paid \$800 per month. When the boat entered the service of government, Stone left her, and a pilot named Goring was employed at \$700 per month. In the settlement made by the respondents with government, \$1000 per month was allowed for the libellant's services, and received by the defendants.

From these undisputed facts, it seems fair to conclude that libellant's services as master and pilot should not be rated lower than \$900 per month. At this rate, for four months and ten days, they would amount to \$3900. From this sum there must be deducted \$1000, which the libel admits to have been received on account.

The respondents claim that the further sum of \$1000 should be deducted for damages, which, through the libellant's carelessness and negligence in the discharge of his duties as master, occurred to flour during the voyage, and for which they had been compelled to pay. If this allegation be established, the amount paid should be charged against him. But the only evidence tending to support this statement is the fact that one hundred sacks of flour, shipped at St Louis for Fort Benton, were found, on arrival at the latter place, to be damaged, and that \$1000 was allowed the owners for the injury.

The flour was placed on deck by order of the owners. In passing over a sandbar, it, with other parcels of the cargo, was taken off to lighten the vessel. In reshipping, after the boat had passed the bar, some twenty sacks of it, under the supervision of the mate, and without the

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knowledge of the master, were stowed in the hold. Besides the libellant, the mate is the only witness who testifies on this subject. He declares that other sacks of flour, not of this lot, which were placed in the hold with these, were not injured. It also appears that the damage was found to exist in other sacks, which were of this lot, but were not placed in the hold. From this testimony, it cannot be presumed that the injury was caused by the stowage in the hold. But if it were so, the custom seems to be settled, that the manner of storing the cargo in steamboats, on the western rivers, is a matter under the special charge of the mate. In this case, at least, it is clear that what was done by him was in violation of the orders, and without the knowledge, of the libellant.

No proof is offered to show that the flour was sound when received, or that the injury was not the necessary effect of the long voyage on some peculiar condition of the flour. Nor is any evidence given of the manner in which the loss was settled with the owners of the flour, —whether by a lawsuit, by arbitration, by the order of the defendants, or of some agent or consignee of their vessel at Fort Benton, or by the libellant or master. In reference to all this we are left to conjecture.

It is certain that no actual carelessness, negligence, or want of attention on the part of libellant is shown. If he is to be held liable at all, it must be upon a principle which would make him liable to the owners of the vessel for every loss for which they or the boat would be liable to shippers or passengers. Can such a principle be maintained? It is undoubtedly true that,

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by the maritime law, although the master may have no interest in the vessel, he is yet liable to the shippers in many cases where, by the general principles of the common law concerning principal and agent, he could not be held. This personal liability of the master for contracts and obligations which he undertakes as agent or servant of the shipowners, who reap all the profits of the voyage, and pay him only a stipulated compensation, grows out of the fact that while the owners may be unknown, or beyond the reach of the contracting parties, personal credit is given to him by parties who, thus dealing with him, must be protected.

But when the question is one between the master and the owners, it does not seem just that the former should be held to anything more than reasonable care and diligence, and the exercise of such skill as his position may be supposed to require. In other words, while, according to the stringent rules governing common carriers, the owners are liable to shippers, and while the master also may be liable to them to nearly if not quite the same extent, it by no means follows that his liability to the owners is governed by the same rules.

Such a doctrine would make it very unsafe for any responsible man to act as a master, because he would become practically an insurer to his employers, against the rigid obligations which they have assumed to third parties, as common carriers. We are not aware that any such principle has received the sanction of the courts.

Applying these views to the facts of the present case, we do not perceive how the libellant can be held respon-

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sible to the respondents for the damage done to the flour, even conceding, what is not proved by the testimony before us, that the injury was suffered during the voyage, and was one for which the boat was liable.

The libellant, therefore, is entitled to a decree for the sum of \$3900, less the \$1000 paid him, with interest by way of damages on the \$2900, from July 1, 1866, to the present time.

Judgment accordingly.

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Before Mr JUSTICE MILLER, on appeal.

UNITED STATES *v.* 269½ BALES OF COTTON.

WOLF & M'PHERSON, *Claimants.*

- I. PROCEEDINGS IN PRIZE.—Great laxity is tolerated in proceedings in prize courts; and irregularities, such as the captors not being parties, and not bringing the prize into court for adjudication, may be corrected.
- II. JURISDICTION IN PRIZE ON RIVERS.—The admiralty courts of the United States have jurisdiction in prize over captures made on the Mississippi river during the current rebellion.
 1. *Necessity of prize courts.*—There are certain reasons, founded on the general principles of international law, why every capture on the high seas, *jure belli*, shall be carried before a prize court.
 2. *Admiralty jurisdiction.*—The exclusive jurisdiction of the admiralty over the great rivers is now well established.
 3. *Circumstances.*—The naval contests thereon have been of great magnitude during the current rebellion, and numerous captures, *jure belli*, have been made, and the so-called Confederate States have been recognized as belligerents.

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III. WHEN CAPTURES HAVE BEEN HELD, IN ADJUDICATED CASES, TO HAVE BEEN WITHIN THE PRIZE JURISDICTION—

1. *By navy.*—The prize jurisdiction has been sustained only when the naval arm has made, or co-operated in making, or, by its presence and active assistance, contributed immediately in effecting the capture.

2. *Attack from sea.*—The force operated from the sea.

3. *The locality.*—The capture has been of some place used in naval warfare, as an island, &c.

4. *The vessels aiding.*—Vessels not commanded by government officers, nor armed, and used merely as transports for troops, are not war vessels, and do not bring within the prize jurisdiction a capture on land by military forces.

IV. CONJUNCT CAPTURES ON LAND ARE BROUGHT WITHIN THE PRIZE JURISDICTION ONLY BY STATUTE.

THIS was a proceeding in prize for the adjudication of certain cotton. The facts appear from the libel, which was as follows :

United States of America, Eastern District of Missouri, S.S.

In the district court of said United States for said eastern district: To the Honorable Samuel Treat, judge of said district court :—The libel of William W. Edwards, attorney of the United States for said eastern district of Missouri, who, being here in his own proper person, prosecutes in the name and on behalf of the United States, against 269½ bales of cotton, marked “C. S. A.” and other marks, and against all persons lawfully intervening for their interest therein, does hereby propound, allege, and articulately declare to this honorable court as follows :

Firstly, That said 269½ bales of cotton, marked as

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aforesaid, are now in the city of St Louis, in the said eastern district, and are in the possession and custody of the marshal of this court; that the same were first seized by said marshal on the 13th day of October, A.D. 1862, the said bales of cotton being, at the time of said seizure, on board of the steamboat "John H. Dickey," and on the Mississippi river, a public, navigable water of the United States, and within the admiralty and maritime jurisdiction of this court.

Secondly, That on or about the 26th day of September, A.D. 1862, in pursuance of the instructions of the President of the United States, Captain William Sands, being a duly appointed and commissioned officer of the army of the United States, and being there in the military service of the United States, in the army called the "Army of the South-west," the said army being then stationed near the town of Helena, in the State of Arkansas, and then and there operating in military warfare, under and by command of the President of the United States, against the rebels in arms against the government of the United States; that the said Captain Sands, with and in command of a battalion of the 10th regiment of Illinois cavalry, which was then and there a part of said army of the south-west, and then and there in the military service of the government of the United States, and acting under the order of the President thereof against said insurrectionists, left the encampment of said army near said Helena, and embarked on the Mississippi river on board the boats "Jatan" and "Conway," which were then and there vessels of the United States, and in the service of the government

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thereof, for the purpose of going on an expedition of war, called a scouting expedition or reconnaissance, into a certain district of the State of Mississippi, held, possessed, and controlled by said insurrectionists, so in arms against said government of the United States; that said detachment, being so embarked, did proceed by way of the Mississippi river, and land in said State of Mississippi, and then and there penetrated into the country so occupied and controlled as aforesaid; that said captain and his command, while so employed, discovered, and by force of superior numbers overpowered, certain insurrectionists then and there in arms against the government of the United States, and commanded by a certain insurrectionist styling himself a lieutenant in the army of the Confederate States of America, and took said so-called lieutenant prisoner; that said captain and his command captured from, and then and there took out of the possession of, said rebels in arms, the said 269½ bales of cotton, together with some twenty or thirty other bales of cotton, and seized the same as a prize of war; that said cotton was captured, seized, and taken away by said soldiers of the United States, in the service of the government thereof, in time of war, when on a hostile expedition into an insurrectionary State and district, from insurrectionists waging war, and aiding and abetting the rebellion against the government of the United States; that it was by said soldiers of the United States conveyed to said river, and was taken thence to said State of Arkansas, within the lines of the army of the United States in said State; that said 269½ bales, after being detained there, were afterwards brought to said St Louis.

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And the said attorney of the United States says, that said 269½ bales of cotton were, on being so captured, ever since have been, and yet are, the property of the United States, and of no other person whatever; that as property so captured in war from insurrectionists in arms against the government, by troops of the United States, the said 269½ bales of cotton are forfeited and confiscated to the United States.

Thirdly, And for other and further matter in this behalf, the said attorney for the United States says, that in addition to the matters set forth in the second article of this libel, it is also true that the said detachment was greatly aided and assisted in said capture by the said vessels so in the service of the United States as aforesaid; that said detachment embarked on board said vessels on the said river, being then and there a public navigable water of the United States, and within their admiralty jurisdiction, and was by said vessels conveyed on said water nearly to the place of said capture, at or near which place the said vessels, their officers and crews, co-operated with said troops in making said capture; that said capture was made by the combined force of said troops and said vessels, with their officers and crews, and could not have been made except by such co-operation and assistance. But the said attorney is not informed in regard to the names of any of said officers or crew of either of said vessels, the said cotton not having been brought by them, or any of them, within the jurisdiction of this court.

Fourthly, That all and singular the premises are true, and within the jurisdiction of the United States, and of

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this honorable court; that the matters hereinbefore stated are matters public and notorious.

Wherefore the said attorney on behalf of the United States prays the usual process and monition, according to the course of practice in such cases, and that all persons claiming any interest in the said property, or any part thereof, may be cited to answer the premises; and that all due proceedings being had, the said 269½ bales of cotton may be condemned as forfeited, and for such other orders, decrees, and relief as is right and proper in the premises.

To which libel Daniel Wolf interposed his exceptions as follows :

The United States v. 269½ Bales of Cotton, Libel
No. 940, 1862.

In the district court of the United States for the Eastern District of Missouri: To the Honorable Samuel Treat, judge of said district court :—Daniel Wolf, claimant of ninety-three bales marked “ D. W.” of said 269½ bales of cotton, now comes and demurs and excepts to said libel, on the following grounds, and for the causes following :

1. That the supposed facts alleged in said libel do not constitute a cause or ground of forfeiture or confiscation of said 269½ bales of cotton, or any portions thereof, under any law or usage of the United States or of nations.

2. That the supposed facts alleged in said petition do not bring the said cause and subject matter of said libel within the jurisdiction of this court.

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3. Because said libel is indefinite and vague in its statements, and bad for general uncertainty in that respect.

4. Because the subject matter of complaint, as in said libel stated, is not a matter or subject for prosecution by libel.

And William M. M'Pherson also interposed exceptions as follows :

The United States of America v. 269½ Bales of Cotton, No. 940.

In the district court of the United States for the Eastern District of Missouri: To the Honorable Samuel Treat, judge of said district:—The exceptions of William M. M'Pherson to the libel of William W. Edwards, attorney of the United States for the eastern district aforesaid, alleges that: *First*, The court has no jurisdiction in the premises, as the same is set forth in said libel. *Second*, That any forfeiture for the matters and things in said libel mentioned, would be contrary to the constitution and laws of the United States. *Third*, That upon the matters and things in said libel contained, this court could give no judgment against the libelled goods.

Wherefore the said claimant is not bound to answer the same, and prays that said libel may be dismissed.

In the district court these exceptions were sustained and the libel dismissed. Thereupon the United States appealed to this court.

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The cause was argued by
Mr Noble, for the libellant.
Mr Glover, for claimants.

MR JUSTICE MILLER.—This is an appeal from the decree of the district court for the eastern district of Missouri, dismissing the libel upon exceptions taken to its sufficiency.

In the prayer for an appeal, the case is alleged to be one of prize of war. The counsel state distinctly that they so understand it; and that the district court, in hearing it, was sitting as a prize court in admiralty. No claim is made under any of the acts concerning confiscation or forfeiture of the property of rebels in the present war, nor under any act prohibiting trade or intercourse with the enemy. The proceeding against the property in question is based solely on the ground that it is captured *jure belli*; and application is now made to this court for condemnation of its proceeds as prize of war.

But very few lawyers of the present day have any experience in prize courts; and it is no reflection upon the general professional character of the learned counsel who drew the libel in this case to say, that though perhaps more nearly a prize libel than anything else, it is not, as such, aptly framed.

In substance the statement of facts in the libel, on which the condemnation of the cotton is asked, is as follows :

On the 26th day of September, 1862, Captain William Sands, an officer of the United States army, embarked at Helena on the boats "Iatan" and "Conway," with a

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battalion of the 10th regiment of Illinois cavalry, said "vessels being vessels of the United States, and in the service of the government thereof." It was a scouting expedition or reconnaissance into a certain district in the State of Mississippi, then held and controlled by the enemy.

The detachment, proceeding by the river and by land, penetrated into the district just mentioned, and there came upon, and by force of arms overpowered, a body of the enemy's troops. They took prisoner a lieutenant in command, and from the possession of the force under him took the 269½ bales of cotton herein libelled. These were marked "C. S. A.," and were seized as prize of war. The soldiers conveyed the cotton to the river; thence it was taken to the State of Arkansas, and it was finally brought to this city.

It is averred that it is now the property of the United States, and is forfeited and confiscated.

It is then alleged that the Mississippi river is within the admiralty jurisdiction of the courts of the United States; that the capture was made by the joint action of the vessels aforesaid and the soldiers, and that it could not have been made without the co-operation of the vessels.

There are many irregularities in the proceedings, as disclosed by the record. Thus, the captors are not parties to this proceeding, and did not bring the prize into any court for adjudication. Moreover, as appears from the certificate of the clerk, the property has been sold, and the proceeds cannot be remitted to this court, because they are held to answer to other libels, filed before the

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present one, on the instance side of the district court. But these irregularities are not fatal to the proceeding. Great laxity is tolerated in prize courts. This is stated with his customary fulness and learning by Mr Justice Story, in "The Cargo of the Ship Emulous," 1 Gallison, 563. And if this case shall be found, in its substantial elements, to constitute prize of war, the libel may be reformed, and the proceedings corrected.

The first point which is pressed upon the attention of the court is, that on the waters of the Mississippi, remote from the ocean, and from any territory belonging to foreign or independent nations, there can be no captures that call for the interposition of a prize court. I confess that, previous to the argument of the case, and the investigation which I have made in consequence, I was strongly inclined to that opinion.

There are certain reasons, founded upon the general principles of international law, why every capture upon the high seas, *jure belli*, shall be carried before a prize court.

The oceans and seas are the great highways of the world. Free transit over them is the common right of all nations; exclusive jurisdiction or control is possessed by none. Civilized States also claim and exercise the right of trading and mooring their ships in each other's ports; and, subject to such restrictions as each government may impose for its own security, or the protection of its own trade, this is conceded by the rules of international law. And when nations go to war, when hostile fleets encounter, and ports are blockaded, the law of nations, where for peace it has established these

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privileges and limitations, calls into operation, as a recognized part of itself, the laws of war. There must be a jurisdiction administering those laws, and this is found alone in the prize courts. These courts decide questions of the existence of such a war as confers belligerent rights; of the validity of blockades; of the lawfulness of captures; and various other matters which no other court can reach, and which, affecting as they do the rights of neutrals and enemies, who are not subject to the jurisdiction otherwise than by the international laws applicable to a state of war, can be determined only by those laws.

It is urged, with great force, that none of these principles are necessary, or can properly be applied, on a river wholly within the boundaries of one government; that all captures made thereon should be subject alone to the law of the country which has the sovereignty, to the exclusion of those rules of the law of nations which govern the common highways of the world.

However conclusive this argument might have been fifty years ago, if taken in the admiralty court of Great Britain, there are many reasons why it should not, in more modern times, in an American court, and during the present war, have the same force.

The supreme court of the United States, in *The Prize Cases* (2 Black, 635), at the last term, decided that between the government of the United States and the rebels a war exists, which confers upon our government at least, the rights of war; that the success of the rebels has enabled them to establish military lines, south of which is enemy's territory and property. This must

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apply as well to the waters within those lines, as to the land; and it would seem necessarily to bring the laws of war into action as to captures made on those waters.

While it was the well settled doctrine of the admiralty court of England, that its jurisdiction as an instance court did not extend beyond tide water, and even in tide water was excluded from all places in the body of a county, as from havens, and within reaches between headlands, no such restrictions were placed upon the jurisdiction of the prize courts.

In the case of *Lindo v. Rodney*, reported in *Douglass*, side page 593, Lord Mansfield said, "As to a matter done in the ports, havens, or rivers within the body of a county of the realm, the admiralty is excluded. But the prize court has uniformly, without objection, tried all captures in ports, havens, &c., within the realm. It happens often. We all know of such cases."

In the case of "*The Genesee Chief*" (12 Howard's R., 443), the supreme court of the United States says that the reason why the English courts of admiralty hold tide water to be the limit of their jurisdiction, is that the rivers of England are navigable only as far as the tide ebbs and flows; and tide water and navigable water being thus rendered synonymous and interchangeable terms, the former has been substituted for the latter as more convenient and easily determinated. Of the lakes in the interior of this continent, in the same decision, it is said, "These lakes are in truth inland seas. Different States border on them on one side, and a foreign nation on the other. A great and growing commerce is carried on upon them, between different States and a

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foreign nation, which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have encountered on them, and prizes been made; and every reason which existed for the grant of admiralty jurisdiction to the general government on the Atlantic seas, applies with equal force to the lakes. There is an equal necessity for the instance, and for the prize power of the admiralty court to administer international law, and if the one cannot be established, neither can the other."

These sentences are pregnant with meaning; and at the time they were delivered, except that we have here no foreign nation, every word of them applied with equal force to the great river on whose banks we are now sitting. And since the same court has recognized a belligerent foe in the rebel forces, that difference for our present purpose has no longer any significance. Hostile fleets have encountered upon its waters, prizes have been made, and it has become the theatre of naval contests of greater magnitude than, at the time that opinion was rendered, were dreamt of, on the lakes. In the case last mentioned, the initiation and rapid increase of our inland steam navigation, and the new relations of commerce which it established, were given as additional reason for the recognition of admiralty powers in the western waters. But gunboats with iron plates and immense guns capable of demolishing the strongest forts and intrenchments, had not then been thought of. The present war has developed on these rivers a naval power unknown to former times. In a case like the present, we cannot shut our eyes to these facts.

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Our gallant tars have been sent from the seaboard to man these vessels on the rivers. When, by their valor, and by the use of vessels of war, they have captured an enemy's vessel, shall they have no court in which their prizes may be condemned?

The introduction of steam, as a motive power, into vessels of war, enabling them to penetrate on inland waters, far into the interior of the country, has revolutionized naval warfare in this respect, as in many others. The presence in the waters of this great stream of a hostile fleet of a foreign nation, is among the contingencies for which we must be prepared.

Again, captures may be made on this river, and others similarly situated, of property belonging to neutrals, who have a right, before it is condemned to the captors, to the judgment of a competent court upon their claims.

We have then a court which, by the constitution and laws, is authorized to determine this question of prize or no prize; and we see that the exigency may arise, in which the question between the captor and the claimant should, by the adjudication of this court, be answered. We certainly cannot decline the jurisdiction, and, in the face of the fact, hold, that on the Mississippi river no such case can arise.

The question then presents itself, whether the facts of this capture, as set forth in the libel, make a case of prize of war.

The appellant insists that the case is one of conjunct capture by land and naval, or, at least, by land and water forces; and that this circumstance brings it

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within our jurisdiction, as a prize court. This position may seem to be supported by the language of Mr Justice Story, in the case of "The Cargo of the Emulous," cited above. He says, on page 575, "However the question may be, as to the right of the admiralty to take cognizance of mere captures made on the land, exclusively by land forces, as to which I give no opinion, it is very clear that its jurisdiction is not confined to mere captures at sea. The prize jurisdiction does not depend upon locality, but upon the subject matter. The words of the prize commission contain authority to proceed upon all, and all manner of captures, seizures, prizes and reprisals, of all ships and goods, that are and shall be taken. The admiralty therefore not only takes cognizance of all captures made at sea, in creeks, havens, and rivers, but also of all captures made on land, where the same have been made by a naval force, or by co-operation with a naval force. This exercise of jurisdiction is settled by the most solemn adjudications." But this general language of the learned judge is to be qualified by the case then before him. The property proceeded against was 550 tons of pine lumber, part of the cargo of the American ship "Emulous," which was seized as enemy's property after the same had been discharged from said ship, and, as the statement of the case as reported by Gallison shows, while afloat in a creek or dock at New Bedford, where the tide ebbs and flows. And the learned judge expressly says, "Had it been landed and remained on land, it would have deserved consideration, whether it could have been proceeded against as prize under the admiralty jurisdiction; or

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whether, if liable to seizure and condemnation in our courts, the remedy ought not to have been pursued by a process applicable to municipal confiscations. On these points, I give no opinion."

The case was carried to the supreme court, where the decree of the circuit court was reversed. The case is reported under the title of *Armitz Brown v. The United States* in 8 Cranch, 110. In a dissenting opinion, characterized by the most extended and learned research, Mr Justice Story expressly says, "As to the right of the admiralty to take cognizance of mere captures made on the land, exclusively by land forces, I give no opinion."

The case of "*The Rebeckah*" (1 Robinson, 227), decided in 1799, was a contest between the admiralty and the captors. The circumstances were, that the vessel, on putting into St Marcou for safety, was fired at from the fort, and struck her colors, and was taken by a boat's crew sent out from the fort. St Marcou was a small island, occupied exclusively as a naval station for naval supplies, and for the temporary accommodation of ships of war. The question was between the admiralty claiming the vessel as *droit* of admiralty, and the captors. Sir William Scott, in his judgment, holds it a maritime capture, because, although made from the shore, "The whole force, such as it is, upon this little spot, is entirely subservient to these vessels, and for their use, and for no other purpose, as the certificates declare. Such a place, so selected and so employed, is hardly to be considered as anything else than as a part or appendage of the naval force; it is a sort of stationary tender, rather attached to and dependent upon these vessels, than

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having the vessels attached to and dependent upon it. This peculiar character of the place distinguishes it most essentially from the case of a land fortress possessed by a military garrison. The capture then was effected by naval commissioned persons, using a force immediately subject to their use; and from its peculiar circumstances sufficiently naval in itself to be distinguished from an ordinary land force, subject to military persons. It is a maritime capture, effected regularly by a maritime force, and in a spot where the right of the admiralty had not yet commenced upon the thing itself at the time of the surrender."

And he clearly indicates that, had the force by which the capture was effected been under the command of the military instead of naval officers, it would have been *droit* of admiralty. He says, "Upon this subject I entirely accede to what has been laid down, that a capture at sea, made by a force upon the land (which is a case certainly possible, though not frequent), is considered generally as a non-commissioned capture, and inures to the benefit of the lord high admiral. Thus, if a ship of the enemy was compelled to strike by a firing from the castle of Dover, or other garrisoned fortress upon the land, that ship would be a *droit* of admiralty, and the garrison must be content to take a reward from the bounty of the admiralty, and not a prize-interest under the king's proclamation."

And again, he holds that, even when naval forces land and use arms of the military, and fortifications by which to effect the capture, the result is the same.

This, then, is the case of a capture by naval forces of property on the same footing as if it were afloat.

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The Island of Trinidad (5 Robinson, 95), decided in 1804, was a claim on behalf of several ships to share in the capture, among other things, of the island and its dependencies. Without entering into any consideration of the principle here involved, and occupying himself with a question whether the vessels were present at the close of the conflict, the same learned judge pronounced some of them entitled to share in the capture of the island. This, then, is the case of a capture by naval forces operating from the sea, of property on land.

The Capture of Chinsurah (Acton, 179), decided in the high court of appeals in 1809, by Sir William Grant, was the case of the capture of the Dutch town and fort by a vessel of the squadron, and a detachment of the East India Company's troops. Previous to the capture, the Dutch East India Company had entered into many contracts with neighboring merchants for supplies of certain articles of merchandise. The governor of the place, among others, had entered into such contract with one Halsey, and had on account thereof advanced to him £23,200. At the time of the surrender, this contract remained unperformed, and the question was presented, whether it should be condemned for the English Company or for the naval forces, each seemingly claiming the whole fund. The court condemned the property generally as prize to the crown, to be distributed. From this sentence both parties appealed. The sentence was affirmed. The reasons for the judgment on the point before us here are not assigned. But it is plain that the case was one of conjunct capture, which was effected by operations from the sea, and by the aid of naval

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forces, and, as it would seem, all under the vice-admiral's command.

Nor does the case of Thorshaven (Edward's Admiralty, 102) throw much light on the question. It is enough to say here that, whichever command should be deemed the captors, the capture was by naval forces operating in naval warfare.

In *The Buenos Ayres* (1 Dodson, 28), the single clause with which Sir William Scott commences his judgment shows the circumstances of the case, and how summarily the question of jurisdiction is disposed of by him. He says, "This is a proceeding originating in the capture of the Spanish settlement Buenos Ayres. A claim is set up by Captain Honeymoon, and the other officers and crew of his Majesty's ship 'The Leda,' to share as joint captors in the proceeds of the property captured at that settlement."

I think these cases as nearly support the jurisdiction as any English cases which can be cited. In this country, besides the "Emulous," cited above, we have the case of 680 Pieces Merchandise (2 Sprague's Decisions, 233). These articles of merchandise were ferried across the Chowau river, in North Carolina, at Reddick's Ferry, and landed on a wharf, preparatory to their being taken to Weldon. The river was at the time occupied by a naval force of the United States, for blockading and other purposes of war of the rebellion. The goods were captured soon after they were landed by a force sent for the purpose from the United States steamer "Hunchback," under Lieutenant Calhoun. In his brief opinion, Judge Sprague says, "The authorities

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cited show that the jurisdiction of the admiralty over matters of prize certainly extends far enough to cover the circumstances of this case. How much farther it may extend, it is not necessary to consider. Here, the merchandise being enemy's property, was ferried across a river occupied by our naval forces for all purposes of war, acting under strictly naval authority; and it was soon afterwards seized on the wharf by a naval force sent from one of our vessels for the purpose. It is not necessary to decide whether this property might not be liable to municipal confiscation or forfeiture on the instance side of this court, under any of the special statutes passed to meet this rebellion. It is not proceeded against as forfeited or confiscated, but for condemnation as prize of war; and I am satisfied that the admiralty jurisdiction of this court is sufficient to embrace the case."

In every one of the cases where the court has sustained its jurisdiction in prize, it appears that the force making the capture, or co-operating in the act, was the naval arm, or, by its presence and active assistance, it contributed immediately in affecting the capture; that it operated from the sea; that the place captured was an island, town, or fortress, itself established to resist naval attack, and to support and succor naval expeditions, and accessible from the sea, so that the attacking squadron could directly bring to bear upon it the stress of its armament.

In the present case we do not discover any of these conditions. It is true there is an averment in the libel that the vessels, and officers, and crews co-

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operated with the troops in making the capture, and that it could not have been made without such co-operation.

Perhaps if this allegation stood alone, under the very loose mode of pleading permitted in prize cases, the libel might be sustained, and the parties remitted to their proofs. But the libel, in its preceding part, sets out the substantial facts of the case, and the language just referred to is evidently but the conclusion deduced by counsel from those facts.

The facts thus stated, and not the legal conclusions drawn from them by the pleader, constitute the real foundation of the case, and we cannot reject as surplusage the part of the libel containing them. We must, for the present, consider them as constituting the case presented and relied on by the libellant. From that statement it is not at all inferrible that the vessels named were any part of the naval force of the United States. Indeed, we know that no naval force then existed in those waters. The gunboats were made a part of the navy by order of the government on the 1st day of October, several days after the capture. It is not supposed or alleged that any of these vessels were officered by government officers. They were not even armed vessels, and could not take part in any action, or contribute in any manner, by belligerent force, to the capture. It is not shown that they remained after they landed the forces; and the fair inference is, that they did not. It is averred that the cotton was conveyed by the soldiers to the river, and that it was taken thence to the state of Arkansas; but it is not alleged that it was so taken by the vessels.

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In short, the entire statement is consistent with the fact that the vessels and crews were in the employment of the war department, and were used merely as transports to carry the troops; and it is consistent with no other supposition.

It is also evident that the capture was not made on the banks of the river, but some distance inland, where the vessels could render no other assistance than to land the forces, and receive them again.

I cannot conceive that the employment by the government of unarmed steamboats for the mere purpose of transporting troops from one point to another on the Mississippi river, can render every capture made by the troops or detachments so transported prize of war, and let in the crews and officers of those vessels to a share of the prize money. Such vessels are in no sense war vessels, and are neither expected nor fitted to take part in engagements.

In *The Cape of Good Hope* (2 Robinson, 274), the same claim was interposed on behalf of vessels, which, by reason of many circumstances, were much more nearly connected with the service than these two steamers. Sir William Scott, in his judgment says, "In the next place, it is argued, that these ships were actually employed in military service, although there is no such averment in the plea. It comes out in evidence only (by which I must observe the other party is deprived of the opportunity of counterpleading) that their boats were employed in carrying provisions and military stores on shore: that was a service certainly, but not a service beyond the common extent of transport duty. They

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landed them, probably at the same time with the troops for whose use they were intended; and if not at the same time, still it is no more than what they were bound to do with the stores and provisions they carried."

If now we consider the case as a capture on land of enemy's property, the question seems to me, notwithstanding Mr Justice Story's intimation cited above, even if it can be allowed the force of an intimation, to be free from doubt. It is conceded that the history of neither American nor British jurisprudence furnishes an instance of the exercise of such a jurisdiction by a prize court, unless it has been conferred by statute. My own researches, and the far more laborious and learned examination of my brother who decided the case in the district court, confirm the propriety of the concession. Even in the cases which I have cited above, the jurisdiction was conferred by statute. In the cases of conjunct capture by the two arms of the service, the provision in the act of Parliament was: "That in all conjunct expeditions of the navy and army, against any fortress upon the land, directed by instructions from his Majesty, the flag and general officers, and commanders, and other officers, seamen, marines, and soldiers, shall have such proportionable interest and property as his Majesty, under his sign manual, shall think fit to order and direct."

And in the other cases, the provision is contained in the 3d section of the Prize Act, and confers upon the ships of the crown power to capture "any fortress upon the land, or any arms, ammunition, stores of war, goods,

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merchandise, and treasure belonging to the State, or to any public trading company of the enemies of the crown of *Great Britain* upon the land."

The Army of the Deccan (2 Knapp's Privy Council Reports, 152), a leading case on the subject of military booty, in England, on account of the magnitude of the sum involved, and the great consideration upon which the decision was made, rested entirely on the Army Prize Money Act, 54 Geo. III., C. 86.

In the case of *Lindo v. Rodney*, already quoted, decided A.D. 1782, Lord Mansfield said that he had caused the register to be examined as far back as A.D. 1690, and that he had also made an examination himself, and that no case had been found of the exercise of such a jurisdiction. Since that time, the wars of Bonaparte in Europe have occurred; the British wars in India and China; and our own wars of the present century, with Great Britain, and with Mexico. In each of them enemy's territory was invaded; and if the jurisdiction in question had been seriously supposed to exist, they must have afforded numerous instances of captures of valuable personal property on land, by land forces, where the aid of courts of prize would have been called into requisition. There are no such cases.

But strong as the inference is, arising from this total absence of the exercise of such power for nearly two hundred years, during which we have records of the courts of prize, we are not left to that alone. Dr Phillimore, in the third volume of his "Treatise on International Law," side page 186, speaking of prize courts, says, "It will be seen that by this tribunal, international

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justice is wisely, carefully, and honestly dispensed, and it is a matter of reasonable surprise that such a jurisdiction should have been strictly confined to *sea prize*, and without cognizance over *land booty*, except in cases where the two, owing to the co-operation of the army and fleet, have been blended together."

He then goes on to show that land captures had probably at one time been a subject of the jurisdiction of the ancient court of chivalry, which, having fallen into desuetude, had left no successor to exercise its authority in this matter. He also states, side page 197, that in 1840, a British statute was passed to improve the practice, and extend the jurisdiction of the high court of admiralty, in which it was enacted that said court shall have jurisdiction to decide all matters and questions concerning booty of war, or the distribution thereof, which it shall please her Majesty, by the advice of her privy council, to refer to the judgment of the said court; and in all matters so referred, the court shall proceed as in cases of prize of war. It would be difficult to find a stronger legislative implication of opinion, than that here given of the normal want of this jurisdiction in a court of admiralty.

In *The Two Friends* (1 Robinson, 228), Sir William Scott says, "I know no other definition of prize goods, than that they are goods taken on the high seas, *jure belli*, out of the hands of the enemy; and there is no axiom more clear than that such goods, when they come on shore, may be followed by the process of this court. In such cases the common law courts hold they have no jurisdiction, and are even anxious to disclaim it. The case of the *Ooster Eems*,

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which has been alluded to, was very different from this. In that case there was a material distinction as to the origin of the subject matter ; for it was there expressly said by the great person who then presided, ‘ that those goods had never been taken on the high seas, they had only passed in the way of civil bailment on delivery into civil hands, and were afterwards arrested on shore as a prize : ’ it was held *that there was no act of capture on the high seas*, and therefore that they were not to be considered as prize.”

In the case of Hon. Mountstuart Elphinstone & Henry Dundas Robertson v. Heerachund & Jelmel Amoopchund, 1 Knapp’s Privy Council Rep., 316, certain moneys of the Mahratta chiefs Nawobaoutra, with whom the British were at war, were seized. After the war, suit was brought in the municipal court of Bombay in an action of trover for the money, alleging that it had been seized after the war was ended. In that court the plaintiff recovered judgment, but on appeal to the privy council, that judgment was reversed, on the ground that it was a hostile seizure, made, if not *flagrante belli*, yet *nondum cessante bello* ; and consequently the municipal court had no jurisdiction. But do they say that the plaintiff could have relief in a prize court ? On the contrary, they say that if nothing was done amiss, recourse could be had only to the government for redress.

In all the works on international law, captures of personal property by land forces on land are spoken of as booty. That term is used, as we have already seen, in the extract from Phillimore, in contradistinction to the term “ prize.” See Wheaton’s “ Elements of Interna-

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tional Law," page 405, and Marten's "Law of Nations," pages 288, 289.

Vattel, in his "Law of Nations," page 365, says, "As the towns and lands taken from the enemy are conquests, all movable property taken from him comes under the denomination of 'booty.' This booty naturally belongs to the sovereign making war, no less than conquests. But the sovereign may grant the troops whatever share of booty he pleases."

In the note on page 288 of Marten's "Law of Nations," it is said that the distribution of booty between sovereign and soldiers depends on the military code of the State to which they belong. It is a matter that does not come within the law of nations.

By article 58 of the articles and rules of war adopted by Congress in 1806 (2 U. S. Statutes at large, 366), "All public stores taken in the enemy's camp, towns, forts, or magazines, whether of artillery, ammunition, clothing, forage, or provisions, shall be secured for the service of the United States; for the neglect of which the commanding officer is to be answerable."

In the case of *Brown v. The United States*, cited above, Mr Justice Marshall, delivering the opinion of the court, says, "It is urged that, in executing the laws of war, the executive may seize and the courts condemn all property which, according to the modern law of nations, is subject to confiscation, although it might require an act of the legislature to justify the condemnation of that property which, according to modern usage, ought not to be confiscated.

"This argument must assume for its basis the position

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that modern usage constitutes a rule which acts directly upon the thing itself by its own force, and not through the sovereign power. This position is not allowed. This usage is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded.

“The rule is in its nature flexible. It is subject to infinite modification. It is not an immutable rule of law, but depends on political considerations which may continually vary.

“Commercial nations, in the situation of the United States, have always a considerable quantity of property in the possession of their neighbors. When war breaks out, the question what shall be done with enemy property in our country, is a question rather of policy than of law. The rule which we apply to the property of our enemy, will be applied by him to the property of our citizens. Like all other questions of policy, it is proper for the consideration of a department which can modify it at will, not for the consideration of a department which can pursue only the law as it is written. It is proper for the consideration of the legislature, not of the executive or judiciary.”

The great judge, and the court for which he spoke, proceeds upon the doctrine of the definition of Sir William Scott, quoted above. The property in question was not captured on the high seas, and although it had been but imperfectly landed, yet as it had been placed

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beyond the action of the water, it was removed from the prize jurisdiction. Mr Justice Story, in his dissent, insists that the jurisdiction extends to captures on land by a naval force. And it is in this, as well as in several other positions of his very learned opinion, that he is overruled by the court. The result of the case, in the court of final resort, certainly is, that property on land is not, without the aid of the statute, liable to capture and condemnation as prize of war.

Slocum v. Wheeler, 1 Conn., 429, was an action for trespass, for breaking and entering the plaintiff's dwelling-house on an island in the State of Massachusetts, and taking and carrying away several articles of personal property. The defendants justified, as the commander and crew of a boat commissioned by the President as a privateer, and a condemnation of the property by the United States district court as prize of war. The jurisdiction was questioned, on the ground, among others, that the alleged capture was made on the land. The discussion at the bar seems to have been exhaustive, and the decision made on great consideration. Chief Justice Swift delivered the opinion of the court, and he says on this subject, "It further appears from the record, that the property in question was taken on the island of *Nashawinna*, in the district of *Massachusetts*, within the territorial limits of the *United States*, and not on the high seas, or within the *British* dominions. The act of Congress and the commission of the President gave the defendants no authority to capture *British* effects in such place. They could not be lawful prize of war. The district court had no jurisdiction; and

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the sentence of condemnation is no protection to the defendants."

However desirable it may be that, in a war between nations, there should exist a tribunal similar to the prize court, to administer the law of nations with reference to property captured on land, we find no warrant for asserting that any such authority exists in the admiralty courts of the United States, unless the circumstances of the capture show some element of a force operating from, or on, the water, which would bring it within the recognized rules on that subject.

As a result of these views, the decree of the district court dismissing the libel will be affirmed, unless the district attorney, upon further consideration, shall be of opinion that he can make a case on the facts which will justify the condemnation of the property libelled as prize of war; in which case he is at liberty to amend his libel as he may think proper.

Since the above decision, the *Banda and Kirwee Booty Case*, Law Rep., 1 Ad. & Ec., 109, has been decided in the high court of admiralty of England. In his judgment Dr Lushington says, "But with respect of booty—property captured on land by land forces—the court of admiralty had no jurisdiction until the passing of the 3 & 4 Vict. c. 65." He then sets out the section of the statute, and the order in council issued in pursuance of the act.—[*Reporter.*]

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THE "BRIGHT STAR."

I. FERRY-BOATS—

1. *When not exclusively engaged in ferrying.*—A steamboat, licensed by State authorities as a ferry-boat, to run across the Missouri river, between towns on each of its banks, both within one State, but frequently employed in voyages beyond her ferry limits to distant towns, is not exclusively engaged in ferrying.

2. *Exemption from inspection.*—The simple allegation that such boat is a ferry-boat does not show that it is not subject to inspection under the act of August 30, 1852 (10 U. S. Statutes at large, 61).

3. *When subject to inspection.*—The act of June 8, 1864 (13 U. S. Statutes at large, 120), subjects to inspection under that act ferry-boats engaged in foreign and inter-state commerce.

4. *Not extended by act of July 25, 1866.*—This act does not extend the requirement of the act of 1852 concerning the inspection of hulls, &c., to vessels engaged in commerce wholly within a State.

II. DOMESTIC COMMERCE WITHIN STATES—

1. *Not under national control.*—There is a commerce strictly internal to each State, over which Congress has no control, although it may be carried on by means of the navigable rivers of the United States ; and Congress has, in its legislation, steadily kept this in view.

2. *An instance.*—A steamboat was engaged in carrying passengers from one small town to others on a navigable river, all within one State. At times she carried between the same towns merchandise that was purchased in other and distant States, and, by usual and great routes of travel, brought to one place, whence it was shipped to the place where she received it. *Held*, She was not engaged in inter-state commerce, and her character would not have been changed had the merchandise which she carried been shipped from the place of purchase to the place of final destination in one continuous voyage.

III. ACT OF JULY 25, 1866 (14 U. S. STATUTES AT LARGE, 227), SECTION 9 CONSTRUED—

1. *Licensed pilots on sea-going vessels.*—The last clause of this section refers only to sea-going vessels, and requires them, when under way, except on the high seas, to be under the control of pilots licensed by the inspector of steam vessels.

2. *Steam vessels passing each other.*—The second clause subjects all vessels propelled by steam, while navigating any of the waters of the United States, to the rule for vessels passing each other established under the 29th section of the act of 1852.

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(1.) *Domestic trade*.—Whether this is intended to include vessels not engaged in foreign or inter-state commerce, *quære*?

(2.) *Congressional authority over*.—Whether, in order to protect sea-going vessels, Congress may impose upon vessels not engaged in foreign or inter-state commerce, rules necessary for the purpose, *quære*?

(3.) *Intention concerning*.—Whether this clause had that end in view, *quære*?

3. *Vessels, foreign and domestic, distinguished*.—The first clause applies to all vessels, whether propelled by sails or steam, and was intended to furnish a rule for determining whether they are to be treated as foreign or domestic. That rule is, that vessels subject to the jurisdiction of a foreign power, engaged in foreign trade, and not owned in whole or in part by a citizen of the United States, are not subject to our navigation laws. But all other vessels, however propelled, navigating our waters, are subject to those laws.

Whether the clause means more than this, *quære*?

4. *Inspection not extended*.—This act does not extend the requirement of the act of 1852, concerning the inspection of hulls, &c., to vessels engaged in commerce wholly within a State.

THIS was an appeal from a decree in admiralty.

It was a libel of information, praying process of arrest against the steamer "Bright Star," and a decree for certain penalties, amounting in all to the sum of \$20,500, and that she be condemned and sold to pay the same. The libel in its first article set forth the 2d section of the act of July 7, 1838, "to provide for the better security of the lives of passengers on board vessels propelled in whole or in part by steam," which required such vessels to be properly licensed under existing laws, and that inspection of the hulls and boilers of the same should be made at least once in every year.

The second article is as follows :

"Second, That between the 1st day of August, A.D.

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1867, and the 31st day of August, A.D. 1867, the masters and owners of said steamboat being then and there engaged in making a certain voyage on the Missouri river, from the port or town of Washington, in Franklin county, in said Eastern District of Missouri, on the south side of said river, to another port or place on the north side of said river, and being then and there a vessel propelled by steam, did transport goods, wares, and merchandise, and passengers on board said steamboat on said Missouri river, the same being navigable waters of the United States, without having first obtained from the proper officer a license under said act of Congress in the first article of this libel designated, as in that behalf required, contrary to the form of the statutes of the United States, in such case made and provided, whereby, and by means whereof, the owners of said steamboat "Bright Star" have forfeited to the United States the sum of \$500, one half for the use of the informer, and for which sum the said steamboat is liable to be seized, and to be proceeded against summarily by way of libel in this court."

Then follow sixteen articles, each, like the above, alleging voyages between different towns on the Missouri river, and all in the Eastern District of Missouri. These towns were in Franklin, St Charles, and Warren counties. The former is on the south of the river, and opposite to the others, which adjoin each other on the north of the river. It was in these different articles alleged that the steamer was not licensed, and had not submitted to inspection, as required by the act.

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The answer of the claimants alleged, "That they admit that the said steamer 'Bright Star' has been used and navigated by them on the Missouri river, at and within the Eastern District of Missouri, from the port or town of Washington in the county of Franklin, on the south side of said river, to another port or place on the north side of said river, and that she transported goods, wares, and merchandise, and passengers upon said Missouri river, without having a license therefor, at the several times alleged in the said articulations of said libel; but they deny that said steamer was required to have a license in that behalf, under the provisions of the act of Congress referred to by libellant.

. . . "That the said steamboat 'Bright Star' was built as a ferry-boat, and was duly enrolled as such at the proper port; that since she was so built, she has been used as a ferry-boat, plying between the town of Washington aforesaid, on the Missouri river, and the opposite shore of said stream.

. . . "That at the said times set forth in the said libel, the said steamer was used and navigated on the Missouri river from the port of Washington, in Franklin county, on the south side of said river, then and there having, carrying, and transporting goods, wares, and merchandise on board of said boat upon said river; that the said steamer was used and navigated on said river as a ferry-boat, and in no other capacity; and that in transporting goods, wares, and merchandise, and passengers as aforesaid, she was purely transporting the same as a ferry-boat across said stream, from the port of Washington aforesaid, to a port or place on the opposite side of said stream.

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. . . "That they have a license from the State of Missouri for said boat to navigate said waters as a 'ferry-boat,' and that such being the case, a license from the government of the United States is not required and necessary.

. . . "That under the act of Congress mentioned in said libel on the part of the United States, the said steamboat is not subject to inspection as claimed in the said libel, she having been built as a ferry-boat, and used only as such, and navigating only the waters of the Missouri river, purely within the state of Missouri.

. . . "And that they deny that by reason of the premises, as by virtue of the provisions of said act of Congress, the owners of said steamboat forfeited or became liable to pay the sum of \$500, as alleged by said libellant."

The libel was dismissed upon the hearing, and the United States appealed to this court.

Mr Noble, district attorney, for the United States.

Mr Russell, for the claimants.

MR JUSTICE MILLER—This is an appeal from a decree of the district court for the eastern district, dismissing the libel of the United States against the steamboat "Bright Star." The "Bright Star" is licensed by the proper authorities of the State of Missouri, to run as a ferry-boat in the interior of the State, between the town of Washington, on the Missouri river, and the opposite bank of that river. She is charged, in various counts of this information, with carrying passengers and merchandise to towns on the opposite side of the river, both above and below

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Washington; and this fact is admitted by stipulation filed in the case. This suit is instituted upon the theory that she is subject to the various acts of Congress requiring vessels, impelled in whole or in part by steam, to undergo periodical inspection, and to obtain a coasting license, with which provisions it is admitted that she had not complied.

The defences set up are: *First*, That the vessel is a ferry-boat, and for that reason is not included within the scope of these laws; *Second*, That the acts of Congress do not apply to vessels engaged exclusively in the internal commerce of the state; and *Third*, That if they were intended to apply to this class of vessels, the acts are to that extent unconstitutional.

The first ground of defence cannot be sustained for two reasons: *First*, The boat was used, in the cases mentioned in the libel, outside her ferry limits, making many voyages between towns so distant as to forbid the idea that she was exclusively engaged in ferrying. *Second*, While it is true that by section 42 of the act of August 30, 1852, ferry boats are excluded from its provisions, the 4th section of the act of June 8, 1864, declares that the provisions of the act of 1852, which require the inspection of hulls and boilers, shall apply to all ferry-boats which may be engaged in commerce with foreign nations, or among the several States. It is not, therefore, a sufficient defence in this case to say, that the vessel is a ferry-boat, and no more.

In order to determine what was the intention of Congress in requiring this class of vessels to submit their hulls and boilers to inspection, it is not necessary to go

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further back than the act of June 8, 1864. The provision contained in the section already cited, including, as it does, ferry-boats, tugs, tow-boats, and canal boats, propelled by steam, was evidently intended to cover all vessels of those classes to which the constitutional powers of Congress extended; namely, all such as are engaged in commerce with foreign nations or among the States. The omission to mention commerce with the Indian tribes may be attributed to the fact that there is no such commerce carried on by steam vessels. But there is commerce within the several States wholly internal to each, largely carried on by steamboats, and vessels exclusively engaged therein are carefully guarded from the operation of the act by its very terms. *Gilman v. Philadelphia*, 3 Wallace, 713. It is claimed, however, that this qualification of the act of June, 1864, is removed by the subsequent act of July 25, 1866. The two sections of the act last mentioned which are relied on to sustain this view are the 7th and 9th. The first of these enacts, that steamers used as freight boats shall be subject to the same inspection and requirements as, by the act of 1864, are provided for ferry, tug, and canal boats. From this language we can draw no inference that it was intended to include freight boats not engaged in commerce with foreign nations or among the different States. The intention was merely to extend to other boats the provisions which had, by the act of 1852, been limited to passenger boats.

Section 9 reads as follows :

"That all vessels navigating the bays, inlets, rivers, harbors, and other waters of the United States, except

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vessels subject to the jurisdiction of a foreign power, and engaged in foreign trade, and not owned in whole or in part by a citizen of the United States, shall be subject to the navigation laws of the United States; and all vessels propelled in whole or in part by steam, and navigating as aforesaid, shall also be subject to all rules and regulations consistent therewith, established for the government of steam vessels in passing, as provided in the 29th section of an act relating to steam vessels, approved the 30th day of August, 1852. And every sea-going steam vessel now subject or hereby made subject to the navigation laws of the United States, and to the rules and regulations aforesaid, shall, when under way, except upon the high seas, be under the control and direction of pilots licensed by the inspectors of steam vessels: vessels of other countries and public vessels of the United States only excepted."

There are in this section three distinct purposes declared by Congress in regard to three distinct subjects. Taking them inversely, the last clause refers alone to sea-going vessels, and enacts that when under weigh, except on the high seas, they must be "under the control of pilots licensed by the inspector of steam vessels." The object of this was, no doubt, to meet the decision of the supreme court of the United States, which had ruled in *The Steamship Co. v. Joliffe*, 2 Wallace, 450, that pilots in the harbor of San Francisco had a right to navigate sea-going vessels, although not licensed by the inspector of steam vessels; and to make it plain that all harbor pilots must be so licensed.

The next clause subjects all vessels propelled by steam,

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while navigating any of the waters of the United States, to the rules of vessels passing each other established under the 29th section of the act of 1852. Whether this clause was intended to include vessels not engaged in commerce with foreign nations or among the different States, it is not necessary to inquire, as there is no charge in the libel of any violation of these rules. It is ably contended by the district attorney, that Congress has the right, in order to protect sea-going vessels, to impose upon vessels not engaged in commerce with foreign nations or between different States, such rules as may be necessary for the safety and security of such vessels, and of the persons and property thereon; and that the provision here mentioned was designed to apply to all vessels passing each other in the navigable waters of the United States. We are not prepared to say that this is not a sound view of the provision; nor do we decide that it is. It does not immediately concern the case.

The other provision of this section applies to all vessels navigating the waters of the United States, whether they are propelled by sails or steam; and is intended to furnish a rule, by which it may be known whether they are to be treated as foreign vessels or as American vessels. That rule is, that vessels, subject to the jurisdiction of a foreign power, and engaged in a foreign trade, and not owned in whole or in part by citizens of the United States, are not American vessels, and are not subject to our navigation laws; and that all other vessels, however propelled, found navigating our waters, are to be subject to those laws. Does the clause

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mean anything more than this? What is meant by our navigation laws? If it means all the laws enacted for the protection of the lives of passengers, why were the two subsequent clauses used? For they apply only two of the provisions of the act of 1852 to two classes of vessels navigating the waters of the United States, when the first clause says that all American vessels shall be subject to the navigation laws of the United States.

These and other questions may not be very easily answered, and are not necessary to be answered in this case. It is sufficient to say that we do not think this clause, or any other clause in this act, was intended to extend the requirements of the act of 1852, concerning the inspection of hulls and boilers, to vessels engaged in commerce wholly within the State.

The policy disclosed so clearly by the act of 1864, to confine this class of legislation by Congress to vessels engaged in a commerce within the power of Congress to regulate, can hardly be supposed to be reversed by the language of this section, when the main purposes intended to be secured do not require it. We are also thoroughly impressed with the conviction that there is a commerce strictly internal to each State, over which Congress has no control, though it may be carried on by means of the navigable rivers of the United States; and that Congress has, in its legislation, steadily kept this in view.

Speaking of the terms of the commercial clause in *Gibbons v. Ogden*, 9 Wheaton, 1, Chief Justice Marshall says, "It is not intended to say that these words comprehend that commerce which is completely internal,

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which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary. Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended would not have been made had the intention been to extend the power to every description."

It has been strongly urged that the admiralty jurisdiction in the Federal courts extends to all the navigable waters of the United States, though the voyage may be limited to the ports of the same State; and that a corresponding rule should be applied to the power of Congress over the commerce so carried on. But if we concede that the proposition is true as to admiralty jurisdiction, a concession made in the face of many decided cases, the inference claimed by no means follows. By the Federal constitution, admiralty jurisdiction is granted to the courts of the United States; the power to regulate commerce is granted to Congress. The grant of admiralty power is limited expressly to certain kinds of commerce. On this subject, we agree entirely with Chief Justice Chase, in his opinion in the case of the "*Mary Washington*" in the Maryland circuit, *Law Register* for September, 1866, page 692.

Since the appeal was taken in this case, a statement

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of agreed facts has been filed as further testimony, by which the prosecution claims that it is admitted that the "Bright Star" was engaged in commerce between the States. The substance of this statement is, that besides carrying passengers from Washington to Pinkney and to Augusta, she also, at the several times mentioned, carried merchandise of various kinds, which had been purchased in New Orleans and other cities not in the State of Missouri, and had been transported by the usual routes of commerce to St Louis, thence to Washington, and by the "Bright Star" from Washington to Pinkney and Augusta. It is not stated whether this was done as one continuous voyage or not. It is consistent with the stipulation, that the goods terminated one voyage at St Louis, and were purchased there by some one residing at Pinkney or Augusta, to whom they were forwarded from that city. It is however expressly stated that the "Bright Star" was not running in connection with any line of steamboats or railroad cars. We do not think these facts prove the boat to have been engaged in commerce among the States. Nor would we change our views if it were conceded that the merchandise came from New Orleans to Pinkney or Augusta in one continuous voyage. The only relation which the boat has, under such circumstances, to any commerce, is transportation. Her part in this transportation is too limited, casual, and uncertain, to call it an engagement in commerce among the States. The owner of this small vessel had a right to transport a few boxes of goods from one little town to another, as occasionally became necessary, without inquiring whether the goods

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came from beyond St Louis, or how they came to Washington. It constituted no part of any line of inter-state communication. It ran in connection with no such line of travel or transportation. To hold under such circumstances, that it was engaged in commerce between the States, is to include all transportation of goods within that commerce.

The decree of the district court must be affirmed.

Decree affirmed.

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*Before Mr JUSTICE MILLER, Mr DISTRICT JUDGE TREAT,
and Mr DISTRICT JUDGE KREKEL.*

COPELAND v. THE PHOENIX INSURANCE
COMPANY.

SAME v. THE SECURITY INSURANCE
COMPANY.

- I. WHEN ABANDONMENT OF ASSURED PROPERTY IS JUSTIFIED.—A policy of insurance on a steamboat provided that the assured should have no right of abandonment, unless the damage should amount to half the value of the vessel, as stated in the policy, which was \$45,000. She was, in fact, worth only \$25,000. To justify abandonment, only \$2500 could, after the injury, have remained in her.
- II. OBLIGATIONS OF ASSURED IN CASE OF LOSS—
1. *To make loss light.*—The assured are required to exercise all reasonable care, skill, and diligence, to make the loss as light as possible.

Same v. The Security Insurance Company.

2. *Liable for master's neglect.*—The owner is not excused, though he give proper directions, if the master of the vessel does not observe them, and through such neglect the damages are increased.

(1.) This is on the principle that the master is the owner's agent, and the latter is liable for the neglect of the former.

3. *Owner's negligence.*—If the master does not remain in the vessel a reasonable time, to repair the injury ; and constructs an imperfect bulkhead, which is not fastened to the hull, so as to exclude the water when once pumped out ; and shortly afterwards, another officer raises her in a short time, by supplying the defects, the owner is held to be guilty of negligence, and has no right to abandon her to the underwriters.

III. WHAT IS NOT ABANDONMENT—

1. *Equivocal words.*—The owner, when he heard of the accident, notified his underwriters, and said that he had telegraphed the master that if he could not raise the vessel, he should wreck her, and the underwriters answered, "All right." *Held*, Not to be an abandonment by the owner, nor an acceptance of abandonment by the underwriter.

Argu. The direction of the owner to the master was an assertion of his right to control the vessel. The defendants might well infer that the owner would claim the wreck, and call for indemnity after its value should be deducted from the loss.

IV. OF REPAIRING AND TENDERING THE INSURED VESSEL—

1. *Unjustifiable delay.*—After the defendants had notice of the loss, and before they took possession to raise and repair her, fifteen days elapsed, during which time, as they knew, the machinery, &c., were being removed, all which, if she were to be repaired, would have to be replaced. *Held*, That this delay was unjustifiable.

2. *Condition of vessels.*—When the vessel is tendered by the underwriter to the assured, she must be in such condition that the latter, when receiving her, would have full indemnity for all the injury covered by the policy.

3. *Gross defects in repairs.*—When the deficiencies are obvious, so that, to be seen, they do not need to be pointed out, and are very great as compared with the repairs actually made, it is not incumbent on the assured to point them out, in order to justify his refusal of the vessel, and to maintain his action on the policy.

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THESE were actions upon policies of insurance. They were, upon the stipulation of the parties, tried and determined by the court without the intervention of a jury, under section 4 of the act of March 3, 1865 (13 Statutes at large, 501).

The facts appear in the opinion. But in order to enable the learned reader to apprehend the questions involved in the case, before entering upon the reading of the opinion, the following brief statement is made.

The risks were upon the steamboat "Benton," engaged in trade of the Upper Missouri, running from St Louis to Fort Benton. The policies provided that the assured should have no right to abandon her, unless the damage sustained was one half her value as stated in the policy, which was \$45,000; so that, to justify an abandonment, she must have sustained damage to the amount of \$22,500. She was at the time of the accident worth but \$25,000.

On the 3d day of November, 1865, about sixty miles above Omaha, she was snagged and sunk. Three days afterwards, and as soon as he heard of the accident, the plaintiff notified the agents of the defendants thereof, and that he had ordered the master to wreck her, unless he could raise her, to which their only answer was, "All right." The master made an imperfect bulkhead, and did not fit it securely to the hull, so as to exclude the water when it had once been pumped out. Without much further effort to raise her, he proceeded to wreck the vessel.

On the 23d day of November, the defendants, under

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the terms of the policy, took possession for the purpose of raising, repairing, and tendering her to the plaintiff. In three days they had raised her. But afterwards they proceeded very slowly with the work of repairs, and did not make a tender of her to the plaintiff until May 9, 1866, too late to allow her to make a trip up the river that season. Nor was she then placed in such condition as to furnish indemnity to the plaintiff. To put her in order, \$5000 of further expenditures were necessary.

MR JUSTICE MILLER.—These cases were tried to the court without a jury, and we now proceed to render our judgment.

The “Benton,” the boat insured by these companies, was sunk in the Missouri river, November 3, 1865, about sixty miles above Omaha, in consequence of being struck by a snag, which made a large opening in the side of her hull. It is not controverted that the injury is one covered by the policies of the defendants.

The plaintiff claims that he notified the defendants that he abandoned the vessel there, that he had a right to do so under the policies, and that they accepted the abandonment. The defendants deny each of these positions. They say that they took possession of the boat as she lay sunk, under the provision of the policies which authorized them to do so, for the purpose of raising and repairing her, and returning her to the plaintiff after she had been repaired. They did raise, repair, and tender her to the plaintiff, who refused to receive her.

The grounds alleged by the plaintiff for his refusal are :

1. That he having rightfully abandoned the vessel,

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nothing remained but for the defendant to pay the amount of the insurance.

2. That there was an unreasonable delay in repairing and returning the vessel.

3. That the repairs were insufficient.

In regard to the first of these grounds, we are of opinion that the plaintiff has established no right to abandon the vessel. The most conclusive reason for this opinion is found in the provision of the policies, that the assured shall have no right of abandonment unless the damage or injury shall amount to one half the value of the vessel as stated in the policies. The value therein stated was \$45,000. In order, therefore, to authorize the plaintiff to abandon, the amount of injury sustained must be at least \$22,500. The testimony is uncontradicted that the boat, when she received the injury, was worth \$25,000, and no more. To justify an abandonment, the damage must have been such that no more than \$2500 of value was left in her. We cannot doubt that the furniture in the cabin, the boilers, engines, and other machinery capable of removal, together with the dismantled hull, were worth three times that sum.

But we should fail to do our duty as a court, if we did not say that, independently of that provision of the policy, we have come to the conclusion that there was no right of abandonment in this case. We are satisfied that Captain Yore, who had charge of the vessel, in his hurry to escape from her before navigation became impeded by ice, did not exercise that energy, diligence, and skill in his efforts to raise her, which the principle of law governing such cases requires. The testimony on the

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part of the plaintiff shows that he gave all proper directions to Captain Yore; and that he exercised such faithfulness and frankness as became his position towards the defendants. But the law justly regards the principal as responsible for the acts of the agent. Every principle and every analogy constitutes the master the agent of the owner under such circumstances. It is well settled that in cases of necessity happening during the voyage, the master is by law created the agent for the benefit of all concerned, and his acts done under such circumstances, in the exercise of good faith and a sound discretion, are binding upon all parties in interest. The "*Sarah Ann*," 2 Sumner, 206; *The New England Insurance Co. v. The "Sarah Ann*," 13 Peters, 387. And when the injury is so great as to justify a sale, he from necessity becomes the agent of the underwriters, as well as of the owner, to effect the sale for their benefit. *The Patapsco Insurance Co. v. Southgate*, 5 Peters, 604. If his agency extends to a disposition of the vessel when she is injured but not destroyed, it must extend to all acts which he may do to save her from destruction. And this is the more certain when it is considered that such is his duty. He cannot abandon his vessel in time of danger so long as it is practicable for human exertion, skill, and prudence to save her from the impending peril. Even after she is stranded there is an obligation upon him to take all possible care of the cargo. *The "Niagara" v. Cordes*, 24 Howard, 7. Even in case of capture, the master of a neutral vessel is bound to remain with the ship until she is condemned or a recovery is hopeless. Willard

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v. Dorr, 3 Mason, 161. And in a proper case, after the loss or sale of the ship, he is agent to tranship the freight for the merchant. *Shipton v. Thornton*, 9 Alderson & Ellis, 314; *Jordan v. The Warren Insurance Co.*, 1 Story, 342; *Hunter v. Prinsep*, 10 East, 378.

The owner of this vessel dispatched her on this long, and, as the event proved, hazardous voyage, in charge of a master of his own selection, who was vested with this large authority over her and her cargo, and who was subject to these obligations. The bare statement is enough to show an agency here which subjected the owner to a responsibility for all of the acts and negligences of the master. For the purpose of doing all that the owner ought to do to save the vessel from total loss, the master was his agent.

In an agreement of this kind, the plaintiff contracts for indemnity for, and security against, loss by any of the perils insured against. The defendant contracts to give that security, upon the condition that all practicable means be employed on the part of the insured to make such loss as light as possible. It is a contract which, by its nature, requires a faithful observance of all the obligations imposed by it upon either party.

We are satisfied that the bulkhead which was designed to cover the injured place in the hull and to exclude the water, was not constructed with the skill which Captain Yore is known to have possessed. If more time had been taken, and more care exercised in its construction, a bulkhead could have been made which, when once the water was all pumped out of the hold, would have kept it out. It is clearly shown that

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the one made here was not fitted to the bottom and side of the boat with the skill which prudent officers would, in such an emergency, have exercised. All this is conclusively established by the fact that, without difficulty or material change in her situation, the vessel was in a short time raised by Captain Mann, the agent of the defendants, and that he exercised only such energy and skill, and employed only such means, as had been within Captain Yore's control.

We are therefore of opinion that, for want of due care, diligence, and skill in the effort to raise the vessel, the plaintiff had not entitled himself to abandon her.

We are also of the opinion that the defendants did not accept the abandonment. The evidence upon this point consists of certain conversations between the plaintiff and the agents of the defendants residing at St Louis. When the former heard of the accident, he immediately communicated with these agents, and in one of several conversations about that time, he said to them, "I have telegraphed to Captain Yore, if he cannot raise the boat, to wreck her." To this they responded, "All right." The plaintiff claims that this was a proposition of abandonment on his part, and an acceptance on theirs.

We are not able to accede to this view.

In order to constitute a valid abandonment, no particular form of words, and no writing, is necessary. But in whatever manner it is made, it ought to be explicit, and not left open as matter of inference from some equivocal acts. The abandonment, when properly made, operates as a transfer of the property to the under-

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writer, and gives him a title to it, or what remains of it, as far as it was covered by the policy. No deed is necessary to pass the title. The *Columbian Insurance Co. v. Ashby*, 4 Peters, 139; *Patapsco Insurance Co. v. Southgate*, 5 Peters, 604; *Chesapeake Insurance Co. v. Stark*, 6 Cranch, 268. The law gives to this act *in pais* all the effects which the most accurately drawn assignment would accomplish. *Comegys v. Vasse*, 1 Peters, 193. And if the abandonment, when once made, is good, the rights of the parties are definitely fixed by it, and it is irrevocable by either party without the consent of the other. *Peele v. Merchants' Co.*, 3 Mason 27. These considerations make manifest the necessity that the act operating as an abandonment should be decisive.

In this case, so far from offering to abandon even, the plaintiff asserted his right to control the vessel; and he went on to state the manner in which he proposed to do so. The defendants might well have supposed that, even if Captain Yore should wreck the vessel, the plaintiff would still claim to own the wreck, and call for indemnity for a total loss, less the value of the wreck. The course proposed by him was the only proper one for him to pursue, if he did not intend to abandon the vessel. The defendants' assent to his proposal cannot be construed into an acceptance of the abandonment, which he might or might not afterwards make.

The mere fact of submersion of the vessel does not amount to a total loss. On the high seas it affords strong *prima facie* evidence, but in the shallow waters of the Missouri it does not afford even a presumption. *Emerigon*, c. 12, §§ 12, 13; *Goss v. Withers*, 2 Burr.,

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697; *Anderson v. Royal Exch. Ass. Co.*, 7 East, 38; *Sewall v. United States Insurance Co.*, 11 Pick., 90.

The abandonment, then, by the act of the insured must therefore appear. If, when Captain Yore left the vessel, and refused to make any further effort to save her, the defendants had not interfered, but had stood upon their rights as the case then was, we should now have to ascertain the amount of injury for which the defendants, under all the circumstances, are liable. But such is not the present position of the parties. On the 20th day of the then month of November, which was about seventeen days after the accident occurred, the defendants notified the plaintiff that they should exercise the option authorized by one of the provisions of the policies, and undertake to raise and repair the boat. Accordingly, without any instructions or interference on the part of the plaintiff, they did raise, repair, and tender her to him.

We are of opinion that this is no sufficient defence to the present action, because, first, there was unjustifiable delay in repairing and tendering the vessel; secondly, the repairs were insufficient.

From the time the defendants had notice of the sinking of the boat, until they notified the plaintiff of their intention to raise her, fifteen days elapsed. During this time, as they well knew, the machinery, boilers, and engines were being removed from the vessel as a wreck, all of which, if she were to be raised, would have to be replaced at considerable expense and loss of time. Their determination should have been taken sooner.

This is, however, a minor consideration. A very few

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days after they had determined to raise the vessel, Captain Mann was on the spot, and had her afloat. If the energy and diligence which characterized his proceedings in raising had been exhibited also in repairing her, there would have been no cause of complaint. But he seems to have supposed that when she was once afloat, his employers were safe. The most unaccountable delays occurred in replacing the machinery; no workmen were put upon her until some time in December. But two were employed upon her before she was brought to St Louis. It was not until May 9, 1866, that she was tendered to the plaintiff at St Louis. The actual repairs cost only \$1764.70, a sum so small as to show clearly that there was no reason for the length of time consumed in making them.

It is to be considered here that the vessel was employed by the plaintiff in the trade of the extreme Upper Missouri. Unless a vessel in that trade leaves St Louis very early in the spring, she will encounter low water. The 9th of May is too late in the season to set out upon such an enterprise. One witness says she would have been worth \$5000 more if she had been tendered so as to make a trip that year.

The general rule is, that the repairs must be made as expeditiously as possible, in order that the voyage, if it be not completed, may not be broken up. *Peele v. The Suffolk Insurance Co.*, 7 Pick., 254; *Reynolds v. The Ocean Insurance Co.*, 22 Pick., 191, 1 Metcalf, 160. And even when, by the terms of the policy, this rule is waived by the assured, still such dispatch in the prosecution of the repairs is demanded of the insurer as

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would restore the vessel ready for another adventure in season profitably to engage in the same. And if the insurer is guilty of unreasonable delay, he must bear the consequences.

But we attach more importance to the fact that the repairs were insufficient. The overwhelming preponderance of testimony is, that the vessel lacked \$5000 in value of the repairs necessary to indemnify the plaintiff for the injury sustained by the accident. The deficiencies in repairs, as made, are set forth in the finding of facts at the end of this opinion.

The actual repairs made upon the vessel, cost, as I have already stated, \$1764.70. The expenses of repairing and of raising her were \$12,132.82. When tendered to plaintiff, she was worth \$12,000. When the injury was sustained, she was worth \$25,000. Under these circumstances, there can be no doubt that the repairs were insufficient to meet the obligations which the defendants had assumed under the policies. Without going into an examination of the authorities, I may state that the conditions of these policies, supported by the law, require that the vessel, when tendered, should have been in such a condition that the plaintiff, when receiving her, should have full indemnity for all the injury which was covered by the policy.

It is claimed for the defendants, however, that, conceding the insufficiency of the repairs, inasmuch as the plaintiff did not point out to them the defects, he was bound to receive the boat, make the necessary repairs, and look to a future action at law to reimburse him the expenses; at all events, that he could not recover the

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full value of the vessel by refusing to receive her, until he did point out the deficiencies of which he complains, and give the defendants an opportunity to supply them.

There are decisions which go so far as to say that where the defects are not great, where they are of little importance in comparison with the whole injury to the vessel, where they might have escaped the attention of the insurers while attempting in good faith to comply with the requirements of the contract, they shall not be compelled to pay as for a total loss, unless the particulars to which objection is made are pointed out to them. We have serious doubt whether the principle by the supreme court of Massachusetts, *Reynolds v. The Ocean Insurance Co.*, 22 Pick., 191, 1 Met., 160; *Norton v. Lexington Insurance Co.*, 16 Illinois, 235, asserted to this extent in the cases cited to us, can be sustained as the law. But it is not necessary to overrule these decisions, for there are manifest distinctions between them and the present case. In the first place, the deficiencies here were so obvious, so necessarily within the sight and knowledge of the defendants, that they did not need to be pointed out. Secondly, the deficiencies were so very great in proportion to the repairs actually made, the former being estimated at \$5000, and the latter only a little exceeding \$1700, that it is absurd to say that there was any fair and honest effort to indemnify the plaintiff for his loss.

I have already stated the views of the court upon the fidelity required of both parties in these contracts of insurance, and have commented, as I thought it deserved,

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upon Captain Yore's failure to do all that he could to raise the vessel. And I think that, after getting her afloat, there was a like determination on the part of the defendants to do just as little as was possible, and escape the liability imposed upon them under their contract by the law. In this effort they have failed to escape that liability.

We find that the plaintiff was justified in refusing to receive the vessel, and as the policies are valued policies, he is entitled to the full amount insured by each, to wit, \$5000, with interest from the time the loss was fixed.

To enable the parties to have a review of this judgment in the supreme court, we make the following special finding of facts :

1. There was a due execution and delivery of the policy offered in evidence by the plaintiff in evidence.

2. The boat was struck by a snag, and sunk in the Missouri river, about sixty miles above Omaha, November 3, 1865; which injury was one of the perils against which defendants insured plaintiff in said policy.

3. Under the circumstances, the plaintiff had no right to abandon the vessel as a total loss, even though he gave notice that he did so.

4. There was no acceptance by defendants of such abandonment.

5. The defendants, under the provisions of the policy, took possession of the vessel for the purpose of raising, repairing, and tendering her to the plaintiff.

6. They did raise her, proceeded to repair, and tendered her to the plaintiff at her home port, May 9, 1866.

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7. The vessel was used mainly for the trade of the Upper Missouri river, making trips from St Louis to Fort Benton. She would have been worth \$5000 more to her owner if tendered to him so that she could have put out on her voyage earlier in the spring. The actual tender was not made in reasonable time.

8. The repairs made were insufficient to constitute indemnity for the injury. To this, additional repairs, to the value of \$5000, were requisite. There was not proper canvas or covering for the hurricane deck, nor rigging, nor ropes. The injury to and destruction of furniture were not made good. There were left in the sides of the hull, above light-water mark, cracks through which, when the vessel was loaded and sunk down to them, the hold would have filled with water. Smaller cracks were left in the deck floor. She was not painted. A cargo would have suffered injury from these defects. The repairs in all these respects, except the paint, and even a part of that, were made necessary by the accident, and were covered by the policy.

9. The plaintiff did not point out these defects to the defendants, and refused generally to receive the boat.

On these facts as found, the court renders judgment for the plaintiff for the amount insured in the policy.

Judgment for plaintiff.

Affirmed in Supreme Court, Dec. Term, 1869. 9
Wallace, 461 (Reported).

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COBLENS *v.* ABEL.

I. OF THE LIABILITY OF INTERNAL REVENUE OFFICERS FOR ILLEGAL ASSESSMENTS, AND WHEN SUITS MAY BE BROUGHT AGAINST THEM THEREFOR—

1. *It is but common justice* to hold answerable in damages an executive officer who, under color of his office, commits an illegal trespass upon the rights of a citizen.

2. *The internal revenue act* of July 13, 1866 (14 Statutes at large, 98), contemplates such cases and such prosecutions.

3. *But the right to sue* for such injuries may be, and in that act is, regulated, so that the action must be brought within, or shall not be brought until the expiration of, a specified time.

4. *The object of the provision* is to give to the commissioner, who is authorized "to remit, refund, or pay back taxes illegally assessed or collected," and to pay the costs and expenses of suits, and the judgments recovered therein, an opportunity to learn the facts of the case, and determine what is right to be done.

5. *If he delays his decision six months* after the appeal, the action may then be brought.

ON the 17th of May, 1867, Coblenz sued Abel in the circuit court of the State of Missouri, for St Louis county, in respect of a certain illegal assessment, as he alleged, made and collected by the defendant as collector of the internal revenue of the United States. On the 18th of November following, and before a trial of the said suit, Abel sued out of this court a writ of *certiorari*, for the removal of the cause, under the act of July 13, 1866 (14 Statutes at large, 171, § 67). This being done, on the 9th of May, 1868, the plaintiff filed in this court his declaration in trespass on the case, in which he alleged that the defendant, on the 14th day of May, 1867, as collector of internal revenue of the United States for the first district in Missouri, issued to his deputy his distress-warrant, by virtue whereof the

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said deputy was about to seize sufficient of the property of the plaintiff, out of which to make \$668.92, whereby he compelled the plaintiff to pay that sum, on account of an alleged tax due from the plaintiff to the United States.

To which declaration the defendant pled the general issue.

At the present sittings of the court, the cause came on to be tried before the judges, a jury having been waived by the parties.

The fact of the distress, and the payment under the same, and under protest, was admitted. The plaintiff introduced evidence to show, and he did prove to the satisfaction of the court, that the return of his income which he had made was an honest one; so that it followed that the assessment made upon him as if it were not honest, was improper. But he did not show, and in fact the record showed, that no appeal had been taken to the commissioner of internal revenue from the action of the assessor and collector, or either of them. The plaintiff having rested, the court, by

MR JUSTICE MILLER, held that the assessor and collector had unjustly and unlawfully collected from the plaintiff the amount alleged in the declaration; and that, but for the provisions of the act of Congress, the right of action was made out. The learned judge then read the following sections of the "Act to reduce internal taxation, and to amend an act entitled An act to provide internal revenue," &c., approved July 13, 1866. (14 U. S. Statutes at large, 98):

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“That the commissioner of internal revenue, subject to regulations prescribed by the Secretary of the Treasury, shall be and is hereby authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that shall appear to be unjustly assessed, or excessive in amount, or in any manner wrongfully collected, and also repay to collectors and deputy collectors the full amount of such sums of money as shall or may be recovered against them, or any of them, in any court for any internal taxes or licenses collected by them, with the costs and expenses of suit, and all damages and costs recovered against assessors, assistant assessors, collectors, deputy collectors, and inspectors, in any suit which shall be brought against them, or any of them, by reason of anything that shall or may be done, in the due performance of their official duties; and all judgments, and moneys recovered or received for taxes, costs, forfeitures, and penalties, shall be paid to the collector, as internal taxes are required to be paid: *provided* that where a second assessment may have been made in case of a list statement, or return which, in the opinion of the assessor or assistant assessor, was false or fraudulent, or contained any under statement or under valuation, such assessment shall not be remitted, nor shall taxes collected under such assessment be recovered, refunded, or paid back, unless it is proved that said list, statement, or return was not false or fraudulent, and did not contain any under statement or under valuation” (page 111).

“No suit shall be maintained in any court for the

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recovery of any tax alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the commissioner of internal revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury, established in pursuance thereof; and a decision of said commissioner shall be had thereon, unless such suit shall be brought within six months from the time of said decision, or within six months from the time this act takes effect: *provided* that if said decision shall be delayed more than six months from the date of such appeal, then said suit may be brought at any time within twelve months from the date of such appeal " (page 152).

His honor then said, that it was but common justice that an executive officer, who, under cover of the authority with which he is by law invested, commits an illegal trespass upon the rights of a citizen, should be held to answer for the injury he has inflicted in a court of law. Actions of this nature are daily brought and maintained. We should be little inclined to sustain an act which overturned this principle. The sections of the law just read do not do so. The provision first cited clearly contemplates cases of "taxes erroneously or illegally assessed and collected," and "penalties collected without authority." And it also contemplates that suits will be brought against the internal revenue officers for injuries thus sustained, and that judgments for the damages will be recovered; for it provides that the commissioner may repay to them "the full amount of such sums of money as shall or may be recovered against them, or any of them, in any

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court, for any internal taxes or licenses collected by them, with the costs and expenses of suit, and all damages and costs recovered against assessors, &c., in any suit which shall be brought against them." The case before us is such a case against this plaintiff. Taxes have been "erroneously and illegally assessed and collected," "the full amount" of which he is entitled to "recover against" this defendant.

At the same time, this right of action may be regulated by the government whose officer has transcended his authority. It is competent for it to say how soon the action shall be brought; and equally so, how long a time shall elapse before the action shall be brought. It may provide, and it is highly proper that it should provide, that due time shall be allowed to its officers to inquire into the facts of the case, and determine whether restitution ought to be at once made, or whether the claim should be subjected to a judicial investigation. Especially is this the case when, as here, the restitution is to be made, or the means to satisfy the judgment are to be furnished, out of its own funds. Accordingly, Congress has provided that no suit for the causes mentioned above shall be maintained in any court, "until appeal shall have been duly made to the commissioner of internal revenue," and his decision had thereon.

The object of the provision is to afford to that officer an opportunity to inform himself of the facts of the case, and determine what is right in the premises. He is the officer who is "to remit, refund, and pay back the taxes erroneously or illegally assessed or collected." Cer-

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tainly, nothing can be more proper than that the aggrieved party should bring the facts fully before him, so that he may determine whether he will or will not subject the government to the expenses and costs of suit, which he is also authorized to pay, and which he ought to pay out of the funds of the government.

That is what the last cited section required this plaintiff to do, before he subjected the government, whose officer the defendant is, and out of whose treasury the judgment would be paid, to the expenses and costs of this suit. He did not do so. He cannot maintain this action for that reason.

It is no answer to say that the decision of the commissioner may be withheld, and that, as the law requires it to be first had, the right of action, upon the construction which we have given the law, may never accrue. If upon the appeal duly taken to the commissioner, he withholds his decision more than six months, the action may then be brought. This is expressly provided in the act, which says, that "if the decision shall be delayed more than six months from the date of such appeal, then said suit may be brought," &c.

The plaintiff has not, by the evidence submitted by him, sustained this action, because he has not appealed to the commissioner, and had his decision on the acts of the collector here complained of, or waited six months for the decision to be made.

The plaintiff took a non-suit.

Mr Krum, for the plaintiff.

Mr Noble, district attorney, for the defendant.

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DISTRICT OF IOWA.

OCTOBER TERM, 1868.

Before MR JUSTICE MILLER *and* MR DISTRICT JUDGE
LOVE.

LITCHFIELD v. THE REGISTER AND RECEIVER.

I. INTERESTS OF PRE-EMPTION SETTLERS.—Settlers upon the public lands, under the pre-emption and homestead laws, have an inchoate right, which they should be permitted to perfect into a legal title.

II. PARTIES IN EQUITY—

1. *Land officers.*—The register and receiver of the land office have no personal interest in the public lands, or in lands claimed to be such.

2. *As sole defendants.*—An injunction bill against such officers as the sole defendants, to restrain them from permitting settlers on lands treated by the land department as public lands, entering them under the pre-emption laws, when such settlers are not before the court, is fatally defective for want of parties.

3. *Necessary parties.*—Parties whose interests in the subject matter of the suit, and in the relief sought, are so bound up with those of the other parties that their legal presence in the proceeding is absolutely necessary, must be brought before the court, or it will refuse to entertain the suit.

4. *Impossibility of bringing them in.*—It is no answer to such an objection that it is impossible to bring such parties before the court.

5. *Injunction not retained.*—Nor will the court retain an injunction once allowed to enable the plaintiff to bring them in, when it is apparent that he cannot do so.

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III. POWER OF THE COURTS OVER EXECUTIVE OFFICERS—

1. *Land officers.*—The register and receiver are mere agents of the interior department, to carry out its orders.

2. *Injunction.*—The court will not interfere by injunction with executive officers in the exercise of political or discretionary power.

3. *Judicial character of land officers.*—In acting upon a claim to pre-empt a tract of land, the land officers exercise a judicial discretion.

4. *Title in third party.*—And it seems that this is true even when a third party has a good title to the land to which the claim is made.

5. *Jurisdiction over their judgments.*—In the cases in which the action of these officers has been examined and revised by the courts, jurisdiction has not been assumed until after the land department has ceased to act upon the matter.

6. *Unlike certain other injunctions.*—This case is not within the principle of cases of injunction restraining road and other commissioners, and other bodies, from taking property not in pursuance of the authority of the law.

7. *Convenience.*—The argument from convenience applied.

THIS was a bill in equity for an injunction. Of the many facts alleged in the pleadings, but few need here be stated in order to an understanding of the questions determined by the court.

On the 8th of August, 1846, Congress granted to Iowa, to aid it in improving the navigation of the Des Moines river, from its mouth to Raccoon Fork, alternate sections of the public lands, in a strip five miles wide on each side of the river (9 Statutes at large, 77). The Des Moines rises north of the north boundary of the State, and flows across its whole width south-easterly, and empties into the Mississippi at its extreme south-east corner. The Raccoon Fork branches off from it at a point near the middle of the State. Shortly after the

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passage of this act, the State accepted the grant, and its officers selected the sections designated by odd numbers, lying along the whole course of the river through the State. But soon afterwards the commissioner of the General Land Office raised the question whether the grant extended above the Raccoon Fork. Many conflicting decisions of this question were from time to time made by different officers of the land department. They are stated in *The Dubuque and Pacific Railroad Company v. Litchfield*, 23 Howard, 6, and in *Woolcott v. The Des Moines Company*, 5 Wallace, 681.

In 1854, the Des Moines Navigation and Railroad Company entered into an engagement with the State to carry forward the work of the projected improvement, and in consideration thereof, received from the State the lands which its officers had selected—as well those above, as those below the Raccoon Fork. This company conveyed a very large portion of these lands to this plaintiff.

On the 12th day of July, 1862, Congress passed another act extending the grant over the disputed region above the Fork, which validated the selection previously made by the State, and questioned in the land department. The title thus acquired by, or confirmed to, the State, inured to the benefit of its mediate grantee, the plaintiff, who seems thereby to have taken a good title.

The lands here in question are a large number of sections, and parts of sections, distributed along a line of great extent, and lie above the Fork, within the Fort Dodge land district, of which the defendant Richards

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was register, and the defendant Pomeroy was receiver of public moneys. These officers, acting under direction of their superiors in the land department at Washington, continued to treat these lands as government property, and, as such, subject to be sold and otherwise disposed of under the different laws regulating such matters. And, accordingly, many persons had settled upon, and many were settling upon, many different tracts of these lands, under the pre-emption and homestead laws, filing in the land office the papers required by these laws to make known their claims, making proof before the officers of the facts entitling them to purchase, and receiving, upon effecting such purchases, the usual patent certificates as evidences of their title. At the same time, still other parties were, in the ordinary course of the business of private entries, purchasing other tracts of these lands from these officers as agents of the government.

Portions of these lands were timber lands, and the persons thus acquiring a claim of title thereto, and getting into possession thereof, were cutting it down and otherwise committing waste. At the same time, they were so numerous, that litigations with each would be very expensive and vexatious to the plaintiff.

The object of the bill was to enjoin these officers from receiving any papers from parties claiming any of these lands under the pre-emption and homestead laws, any proofs of the rights under those laws of other parties to purchase tracts claimed by them, and any money from parties asking to make such purchases, and from executing to any such parties any evidences of title, and also

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from adjudicating upon any claims of these parties to make entries or purchases of these lands as public lands.

The defendants answered, that they, by their character, and by their relations to the subject matter in question, and to the parties really interested, could not be thus proceeded against.

A temporary injunction was allowed at the May term of the court by Mr District Judge Love.

Another bill was filed by the same plaintiff against Goodwin, register, and Clark, receiver of public moneys at the land office, at Des Moines, containing the same general averments as to lands within their land district. In this bill the plaintiff's title is alleged to be by a mortgage to him as trustee made by the Des Moines Navigation and Railroad Company.

On this bill, Mr Justice Miller, in vacation, allowed a temporary injunction *ex parte*, the defendants not appearing at the time appointed for the hearing of the application to resist it, but with leave to move to dissolve. The defendants now moved to dissolve these injunctions, and to dismiss the bill against the officers at Fort Dodge for want of equity.

Mr Witherow and *Mr Parsons*, in support of the motions.

Mr Rankin, *Mr Finch*, *Mr Ellwood*, and *Mr Nourse*, *contra*.

Mr District Judge Love did not sit at the hearing of these motions, nor participate in their determination.

MR JUSTICE MILLER.—When the application was made

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to me in the vacation for a temporary injunction, I had strong doubts, on reading the bill, whether it presented a case for judicial action. I accordingly appointed a day for hearing the application, sufficiently distant to enable counsel to prepare for the discussion, and expressed my desire that the question involved should be fully argued. But it seems that when the day for hearing had arrived, the defendants had received no authority to employ counsel, and therefore they were not represented.

As the mischiefs which the complainant sought to prevent by the injunction were great and imminent, and as a similar order had a few weeks before been granted in open court, I concluded to allow the temporary writ without hearing an argument from the plaintiff, which could only be *ex parte*. But I appended to the order a statement that it was made subject to the right, at any time, to move before me for its dissolution. I also expressed my readiness to hear such motion at any time, and my doubts as to the plaintiff's right to the injunction.

Being aware of the large amount of property involved in the question, of the number of persons interested in it, and of the public excitement on the subject, I have since given it some thought, and that reflection, and the arguments made here, have tended to strengthen my first impression. I am now quite satisfied that the bill cannot be sustained, for want of any equitable jurisdiction to grant the relief sought.

The grounds of objection to the bill are two :

1. The want of proper parties defendant, to wit, the individuals who it is alleged are asserting their right to enter these lands by pre-emption or otherwise.

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2. The parties who are before the court are acting as officers of one of the executive departments of the government, in the discharge of functions which are not ministerial, but which involve the exercise of judgment and discretion.

(1.) This bill clearly shows upon its face that its purpose is to prevent the assertion of claims to these lands by persons who are not before the court, and whose interests are not represented by those who are. These are persons, some of whom have settled upon the land, and now claim that in virtue of their residence thereon, they have, under the pre-emption and homestead laws of Congress, acquired a right in the tracts settled upon by them, and that when they shall have done such things as those laws require, they may perfect this right and receive the legal title; while others seek to enter tracts of the land at private sale, making payment therefor either in land warrants or in money. In regard to the first of these classes of persons, if their claim be just, they already have an inchoate right growing out of their residence and improvements, and this right is entitled to the protection of the courts, while the action here sought would effectually prevent their taking such steps as these laws require in order that this inchoate right may become perfected in a legal title which could be asserted in a court of justice. This is by far the most numerous class of persons sought to be affected by the injunction here asked for; it is against them that it is in effect directed.

The land officers are but nominal defendants in the bill. They have no pecuniary interest, and they assert

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on their personal behalf no title or claim to the lands which are the subject of controversy. It is matter of entire indifference to them whether these lands belong now to plaintiff or to the government; whether they shall finally vest in the plaintiff, or in the parties claiming pre-emption rights.

It is, therefore, too clear for argument that the bill seeks, by the operation of the injunction upon parties having no interest in the subject matter of the suit, to destroy or effectually prevent the assertion of the rights of other parties who are not now before the court.

This question of parties has repeatedly received the consideration of the supreme court of the United States. It has uniformly been held that in such cases the court will not proceed. In *Barney v. Baltimore City*, 6 Wall., 280, all the authorities are reviewed, and the relation of parties to suits in chancery are arranged into three classes. One of these classes is thus described: "And there is a third class whose interests in the subject matter of the suit, and in the relief sought, are so bound up with that of the other parties, that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot possibly proceed. In such cases the court refuses to entertain the suit when these parties cannot be subjected to its jurisdiction."

Cameron v. M'Roberts, 3 Wheaton, 591; *Mallow v. Hinds*, 12 *id.*, 194; *Shields v. Barrows*, 17 Howard, 130; *Northern Indiana Railroad Company v. Michigan Central Railroad Company*, 15 Howard, 233; *Barney v. Baltimore City*, 6 Wallace, 280.

And in *Shields v. Barrows* this class is described as

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“persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.”

The applicability of these principles to the case before us is too obvious to require comment.

In answer to this it is urged, as a sufficient reason for the court proceeding without having these parties before it, that in the nature of things it is impossible for the plaintiff to know who will assert a claim to these lands, until they present themselves before the land officers for the purpose, and as they will at once receive from the officers the patent certificates, it will then be too late to enjoin them. The fact alleged of the impossibility of discovering who these claimants are, or will be, may be admitted, but the inference that therefore the court can, in their absence, proceed to foreclose their rights, is not sound.

It is also urged, that the injunction should be permitted to remain until the plaintiff can learn who these claimants are, and make them defendants. This would be a mere trifling with justice. There is no reason to suppose that the plaintiff can ever learn all of those who intend to claim the right of locating these lands. In fact, the bill alleges the fact that such parties are too numerous to sue at law as one ground for appealing to the equitable jurisdiction of the court.

In respect of parties, the bill is fatally defective, with no capability of amendment; and no offer to amend is made.

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(2.) The extent to which the courts will interfere with officers in the executive departments of the government, in the exercise of their ordinary duties, presents a question which has never been fully and clearly answered, although it has more than once received the consideration of the supreme court of the United States.

That the register and receiver of the land office are to be considered, in reference to the matter before us, as the mere agents of the department of the interior, is, I think, very clear. In offering these lands for sale and pre-emption, they are acting under positive instructions received from that department. Should they venture to exercise a judgment of their own, in opposition to those instructions, they would probably be removed or suspended from office, and the purpose of the department be carried out by other persons appointed in their places.

The cases in the supreme court, in which the question here presented has been most fully considered, are those of *Marbury v. Madison*, 1 Cranch, 137; *Kendall v. Stokes*, 12 Peters, 608; and *State of Mississippi v. Johnson, President*, 4 Wallace, 475. It is true that the earlier cases are applications for *mandamus*, but in the last case, which was an application for injunction, the Chief Justice very truly remarks, "That this court is unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of executive discretion." In the two former cases, the court decided that the head of an executive department could be compelled by a writ of *mandamus* to perform duties which were merely ministerial, and

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which involved the exercise of no political or discretionary power. In the latter case, it was held that the court would not issue an injunction to such officers, in any case when those officers were exercising political or discretionary power, and, by implication it is held, that only in the case of merely ministerial duties will they be interfered with by injunction or *mandamus*. What are ministerial duties in this connection is thus defined by the court in that case: "A ministerial duty, the performance of which may, in proper cases, be required of the head of a department by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law." And he gives the duties required in the case of *Marbury v. Madison*, and *Kendall v. Stokes*, as illustrations; in the first of which, the duty was the mere manual delivery of a commission as justice of the peace to the relator, and in the other, the allowance of a credit of a definite sum on the account of the relator with the Treasury department of the United States.

The duties of the register and receiver, in acting upon claims to pre-emption of lands, are not of this character. They have first to determine whether the land which is the subject of the claim belongs to the government, and is not already taken up under some superior claim, and then whether the party claiming has made the requisite improvement, and has shown the required residence on the land. All these questions are to be investigated in a manner which requires the exercise of judicial judgment and discretion, and are the very reverse of

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ministerial, as defined by the court in the case just cited.

In answer to this view of the subject, it is strongly urged that, in the case before us, the bill shows that the lands in question are not within the control of the land officer, because the government has parted with its title; that they are no longer subjects on which the department has any right to act at all; and that, for that reason, the officers are totally without authority for these proceedings.

I must confess that this argument seems to be entitled to some consideration, and I do not feel sure that it is not a sound one. But on the best consideration that I am now able to give it, I do not think it is.

The lands in question are undoubtedly within the territorial limits over which the jurisdiction of those officers extends. In every case where an application is made for pre-emption, the question must necessarily arise, and be decided by those officers, Is the land claimed by the applicant subject to entry? Has it been already appropriated, by prior valid entry, or in any other mode? And though it is claimed that in the present case the appropriation has been made by act of Congress, and this bill shows a *prima facie* title in plaintiff to these lands, I do not see but it is still the duty of the land office to decide that question with the best light it may have, whenever it is raised by a person applying to enter them as unappropriated public lands. If this be so, then, according to the principle supposed to be established by the cases cited, the courts should not interfere with the exercise of that judg-

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ment in the matter while it is under their consideration.

Reference has been made in the argument to the cases in which the supreme court has examined into the manner in which these officers have acted, and have decreed that the person to whom they had issued the patent should convey to the person to whom they had refused it.

These cases are numerous, and depend on the principle that by some means, such as fraud, mistake, or want of authority in the land office, one person has obtained a legal title which equitably belonged to another.

But this jurisdiction has only been exercised after the land department had ceased to exercise any authority in the matter, and in no manner sought to restrain or direct them while in the exercise of their proper duties.

Neither are the cases in point in which injunctions have been granted to restrain road commissioners, street commissioners, railroad companies, and similar bodies, from so exercising their powers as to invade, without authority of law, the private rights of individuals.

These bodies belong to no particular department, and exercise no special executive functions. They are the creatures of law; and when they seek to transcend the limits of their authority, are as much subject to judicial control as private persons are. If we look to the consequences likely to ensue from the establishment of such a precedent as the granting of this injunction, we shall see additional reason for hesitation in doing so.

We are all familiar with the fact that interests of great value are involved in the questions which are every

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day in contest before the land department, and that these are often supposed to depend upon the ascertainment of the legal rights of the contestants. Now, if the courts can, while these matters are pending before the officers of that department, issue a *mandamus* at the instance of every person asserting a legal right which they refuse to recognize, or enjoin them at the instance of every person who believes they are invading his legal rights, in a manner which leaves him no other remedy, the result of that principle will be that in some mode or other all the contested business arising in the course of the sale of the public lands, and delivery of patents for them, will be drawn from the officers to whom the law has confided these matters into the courts of justice, and these courts will find themselves converted into superintendents of the land offices of the country.

In *Wood v. McIntire*, 7 Cranch, 504, the supreme court decided, in a case the converse of this, that the circuit court of the United States had no authority to issue a writ of *mandamus* to the registers of the land office to compel them to issue certificates of pre-emption, when that officer refused to do so, under the idea that the right was already vested in another; and the decision was based upon the ground that no such authority was vested by law in the circuit courts. This case was affirmed by the same court in *McClung v. Silliman*, 6 Wheaton, 598, where it was also held that the State court had no such power over the register. These cases have never been overruled; and if the right to interfere by *mandamus* and by injunction with these executive officers depends on the same general principle as asserted

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in *Mississippi v. President Johnson*, 4 Wallace, 475, they are directly in the way of the relief here sought.

The motions to dissolve the injunctions are granted, and the motion to dismiss the bill for want of equity is also granted.

Motions to dissolve injunction, and motion to dismiss the bill against the land officers of the Fort Dodge district for want of equity, sustained.

Affirmed by Supreme Court, December term 1869, 9 Wallace, 575. Compare *Frisbee v. Whitney*, decided by United States Supreme Court, December term 1869, 9 Wallace, 187.

Ses Gaines v. Thompson, 7 Wallace, 347.—[Reporter.]
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RUSCH v. THE SUPERVISORS OF DES MOINES
COUNTY.

I. THE PRACTICE IN AWARDING AND ENFORCING *mandamus*—

1. *Under Iowa code*.—The chapter on the “action by *mandamus*,” of the revised code of Iowa, changes the character of the writ to an action for the enforcing of any right to which it may be applicable.

2. *Not adopted by the court*.—This chapter has never been

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adopted by this court, as a rule of practice, and can have no force here.

3. *The proceeding here is according to common law.*—This court, in applications for *mandamus*, has always proceeded according to the course of the common law.

II. TAXES NOT ENFORCED BY COMMISSIONERS.—Proceedings to enforce levy and collection of a tax should not be by appointment of commissioners.

1. *Even under Iowa statute* the aforesaid chapter does not authorize an order appointing a special commissioner to levy a tax upon a county, whose officers have, in disobedience to the command of a *mandamus*, neglected to levy a tax, to raise money to pay a judgment.

(1.) This chapter extends the remedy only to compel the performance of a duty, the breach of which is followed by damages.

(2.) The court should not appoint a person to discharge the official duties of an officer, whose appointment, functions, and qualifications are prescribed by law.

2. *Discretion of court.*—The application for the appointment of a commissioner to levy the tax is addressed to the discretion of the court, and will be declined on account of the difficulties attending it.

(1.) *County treasurer should not be displaced.*—The county treasurer, whose sole duty it is to collect the tax, has never refused to perform his duty, and it cannot be assumed that he will do so. He has most important and delicate duties to perform in enforcing the tax. He should not be displaced by a court.

(2.) *Nor assessors.*—The assessors are not in default. They should not be displaced. Were the commissioner to attempt to levy the tax upon their last valuation of property, he would be powerless to compel the records of that assessment from the officer who had been summarily removed.

3. *Constitutionality.*—If the statute of Iowa confers such power, it is in conflict with the constitution of that State.

(1.) That constitution declares that the three departments, the legislative, the executive, and the judicial, shall each be kept separate from either of the others.

(2.) It also provides that no local or special law shall be passed relative to taxes.

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THE plaintiff having recovered a judgment at law against the county, applied to the court for a *mandamus*, directed to the supervisors, commanding them to levy a tax for the purpose of raising the money to pay the judgment. The supervisors made a return to the writ, setting forth matters by which they sought to excuse their disobedience of the order of the court. This return was quashed as insufficient in law, and the question presented itself, how they should be dealt with, and how the court should compel the levy of the tax?

The relator moved the court to appoint George W. Clark, the marshal of the district, a commissioner to levy and collect the tax.

Mr Rorer, Mr Howell, and Mr Edmunds, in support of the motion.

Mr Tracey, contra.

MR JUSTICE MILLER.—In this case, a peremptory *mandamus* was ordered at the last term of the court, directed to the defendants, commanding them to levy a tax sufficient to pay the debt of the relator.

This mandate has not been obeyed, though the marshal's return shows that it was duly served upon the supervisors.

Instead of levying a tax, they have made a return, which attempts to show matters in excuse for not complying with the command of the writ. This return has been quashed, on the relator's motion, as insufficient in law.

The relator now moves the court to appoint Clark, the marshal of the district, a commissioner, with directions

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or orders to levy and collect a tax sufficient to answer the debt due to the relator, and to pay to him the amount of his debt, interest, and costs.

This motion has been fully argued by three eminent counsel in support thereof. I do not understand either of them to base it upon any common law power of the court to invade the legislative function of levying taxes. On the contrary, it is based by all the counsel solely on section 3770 of Iowa Statutes, revision of 1860. I believe it to be conceded, also, that it is optional with the court whether it will make this order, or will proceed by process of attachment to compel the supervisors to obey the mandate heretofore issued to them. The section referred to is a part of chapter 153 of the revision, which chapter is headed in capitals "ACTION OF MANDAMUS." This chapter is one introduced by the codifiers, and was new to our statutes. It changes the character of the writ of *mandamus* in many features, and makes it essentially an action for the enforcement of any right, to which, by its nature, it is applicable. It is no longer limited to cases in which there is no other remedy. Section 3767 provides, that the plaintiff in any action, except those of replevin, detinue, and to recover possession of real estate, "may also in aid of such cause of action, pray and have a writ of *mandamus* to compel the performance of a duty established in such action."

This chapter has never been adopted by this court as one of its rules of practice. So far, therefore, as the right to the order asked for is dependent upon the rules of practice governing this court, it can receive no aid from this provision of the statute. *Pomeroy v. Manin*,

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2 Paine, 476 ; Catherwood v. Gapete, 2 Curtis' C. C., 94. The revision of 1860 was passed by the legislature of Iowa long after any act of Congress adopting the laws of the State as rules of practice in the Federal courts ; and when this court was established in 1862, the judges, in framing rules for the practice of the court, most of which were adopted from the revision of Iowa statutes, excluded all that related to the writ of *mandamus*. Accordingly, in applications for *mandamus*, we have proceeded in the usual common law mode by information and alternative writ in the first instance, instead of by petition, answer, and judgment prescribed in the statute. And the supreme court, in its several judgments, made in this class of cases at its last term, after a full review of the acts of Congress concerning the practice of the courts, reached the conclusion that the issuing of the writ of *mandamus* was to be according to the common law forms, and in virtue of the inherent power of the court. *Riggs v. Johnson County*, 6 Wallace, 166.

If the section under which this order is asked for, and which, at the most, is a mere rule of practice, has never been adopted by this court, nor by any law of Congress, it can have no force here. *Smith v. Cockrill*, 6 Wallace, 756.

But waiving this consideration, let us examine the language of the section on which this extraordinary power is claimed to rest. It reads as follows :

“The court may, upon application of the plaintiff, besides or instead of proceeding against the defendant by attachment, direct that the act required to be done may be done by the plaintiff, or some other person ap-

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pointed by the court, at the expense of the defendant; and upon the act being done, the amount of such expense may be ascertained by the court, or by a reference appointed by the court, as the court or judge may order; and the court may render judgment for the amount of such expenses and costs, and enforce payment thereof by execution."

We are of opinion, upon a fair and reasonable construction of this statute :

1. That it is inapplicable to such an order as the one now asked for.

2. That, if it could be held to apply to such a case as the one before us, it vests in the court a choice as to which of two modes of enforcing its judgment it will adopt; namely, attachment and imprisonment of defendants, or the appointment of a commissioner to do the acts required of defendants.

3. That if the act can be construed as conferring authority on the court to levy taxes by its officer or commissioner, it is unconstitutional.

We have already shown that this chapter on *mandamus* extends the remedy of that writ to many cases not previously embraced by it. Some of these are cases in which a mere ministerial, or, more strictly, a manual and personal act, not in any sense official, may be required of the party; as, for instance, the making of a deed, the removal of a nuisance, the delivery of property, &c. Section 3767, already referred to, not only shows this, but also takes a distinction between that class of duties and those which are official; for, after providing, as we have seen, for a liberal use of the writ, it adds, " But if

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such duty, the performance of which is sought to be compelled, is not one resulting from an office, trust, or station, it must be one for the breach of which a legal right to damages is already complete at the commencement of the action, and must also be a duty of which a court of equity would enforce the performance."

In the case of the abatement of a nuisance, the making of a deed, and the delivery of the possession of property, real or personal, we have instances in which courts of equity have been in the habit of enforcing the performance of the duty, and in which they have also acted, when they thought proper, by means of a commissioner appointed for that purpose. There is no reason why the acts to be performed in these cases may not be as well and effectually performed by a commissioner as by the person whose duty it is to perform them. But in the case of an officer, upon whom exclusively certain public duties have been imposed by law, and whose mode of appointment is fixed thereby; who takes an oath that he will faithfully perform all his official duties, and who is removable from office only in a prescribed manner, there are many reasons why no one else should be appointed to discharge his duties, while he yet remains in office, and more especially why the court should make no such appointment.

The expressions in this section show clearly that the remedy by appointing a commissioner was not considered as applicable to all cases of *mandamus*. We are of opinion that this is one of a class to which it was never intended to be applied.

But if we may, by virtue of this section, proceed to

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enforce the judgment by the aid of a commissioner, it is very clearly a discretionary power the exercise of which is confided exclusively to the court.

Besides the fact that we do not believe this section applicable to the case before us, another reason which determines us to decline the measure which the plaintiff has proposed, is the serious difficulty attending it. The first and only duty, in the performance of which the supervisors are in default, is the levy of the tax. The duty of collecting the tax when levied, is, by law, devolved on the treasurer of the county. This officer has never refused to perform any duty. No tax has been levied for the plaintiff's benefit which he could collect. He is, therefore, in no default; he has neglected no duty; he has not been required by the order of this court, nor even asked by the plaintiff, to perform any. Shall we then assume in advance that he will refuse, and appoint some one in his place? The duties of his office are too important, and too well defined by law, to justify a court in substituting any one in his stead, when there is no charge against him, and no pretence that he has done, or intended to do, any wrong. It is his duty to enforce the payment of the tax, first by sale of the personal property, if necessary, and next by sale of the real estate of the owner. He is also to make a deed to the purchaser, if land sold is not redeemed within three years from the day of sale. This deed is the title on which the purchaser relies. Surely an officer charged with powers which, without a trial in court, deprive one man of the title to land, and confer it on another, should not be displaced, and all his functions transferred, when

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he has failed to discharge no one of his appropriate duties.

Again, the tax must be levied on some valuation. Will the commissioner appointed by the court make a new valuation for himself? The assessors appointed by law have never failed to make such a valuation, and are in no default. Will the commissioner make his levy on the basis of the valuation already made? How will he obtain access to that valuation? It is under control of officers of the law, over whom he has no authority, and who will not be likely to render him any assistance in his assumption of the exercise of their functions. In short, to do what this motion asks of us, would be, by one despotic act of power, because the board of supervisors have failed in the one duty of making a levy for the benefit of this plaintiff, to supersede the treasurer, clerk, assessors, and perhaps other officers, and to disregard and overturn all the provisions of law for the levy, assessment, and collection of taxes.

But if we could see in the provision of the statute an intention to confer this extraordinary power on the court, we are of opinion that it is in violation of the constitution of Iowa.

That instrument declares, art. 3, § 1, "The powers of the government of Iowa shall be divided into three separate departments,—the legislative, the executive, and the judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted."

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That the authorizing of taxes is a function peculiarly and exclusively legislative, will hardly at this day be disputed among people of Anglo-Saxon institutions. Charles I. lost his head in vain, and Hampden and his associates resisted in vain, if the taxing power exists, among their descendants, in any other than a representative body. And though the primary legislative body of the State may confide a portion of that power to other bodies of similar character, this has not been established without a struggle. The great increase of corruptions in municipal bodies, growing out of the ability to create, by taxation, a fund which may be squandered, has made many thinking men doubt the wisdom of endowing them with the power.

The constitution of Iowa, art. 3, § 31, has provided, as a further safeguard on this subject, that no local or special law shall be passed by the general assembly, for the assessment and collection of taxes for state, county, or road purposes.

What is it we are asked to do in this case? We are asked to set aside, in Des Moines county, the statute which confides to the supervisors exclusively the right to assess a county tax, and to assess such tax ourselves by our commissioner; to repeal the general law which makes the treasurer the only tax collector, and enact a special law by appointing our agent to sell the lands, make the deeds, and transfer the property of citizens under cover of the taxing power.

And who are we, who, in the exercise of the assumed taxing power of the state of Iowa, are thus to levy and collect taxes, and, for their non-payment, without giving

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the owners a day in court, to sell lands and divest titles?

In other times, when the functions and relations of the different departments of government were not so well defined and understood as they are now, the executive, invading the province of the legislature, usurped this power of levying taxes. It was never heard, even in those times, that the courts of law arrogated any such power to themselves. Rather were they the refuge of the Hampdens from the oppressions of the kings. If we grant this motion, we shall simply emulate the example, and we shall deserve the fate, of Charles.

Besides, we are the judiciary established by the Federal government. We do not hold our commission from the State; nor do we sit generally to administer or construe her laws; nor are we amenable to her government. We being thus, in a measure, an authority foreign to her, are asked to invade her own proper and exclusive jurisdiction; not merely to act upon her officers by judicial process, a proceeding of which I have elsewhere expressed my views, but to assume the functions of her legislature, and, in a matter which most nearly touches the liberty of her people, overturn her laws and subvert her institutions.

We must decline to do this.

Motion overruled.

As to final process, *Ross v. Duval*, 13 Peters, 45; *U. S. v. Knight*, 3 Sumner, 358, 14 Peters, 301; *Amis v. Smith*, 16 Peters, 303; In matter of *Hopkins*, 2 Curtis' C. C., 567.—[Reporter.]

Before Mr JUSTICE MILLER, on writ of error.

JOHNSON, Assignee, v. BISHOP, Sheriff.

I. STATUS OF ASSIGNEE IN BANKRUPTCY—

1. *May maintain action for possession.*—Under the 14th section of the Bankrupt Act, the assignee becomes vested with the title, and entitled to the possession, of the property of the bankrupt, and he may maintain an action for its recovery in a court of justice.

2. *But not against State Sheriff.*—But such action cannot be maintained in a Federal court, to take such property from a State sheriff, who has taken it upon attachment duly issued to him out of a State court before the proceedings in bankruptcy were commenced.

(1.) *Argu.*—The sheriff's possession is that of the court of which he is an officer ; no other court will interfere therewith as long as the proceedings are pending.

(2.) *Argu.*—Whether or not the State court has been ousted of its jurisdiction by the proceedings in bankruptcy, depends upon two questions of fact : one, whether the debtor has been adjudicated a bankrupt ? and the other, whether he is the only member of the firm ? Of the action of the Federal court on these matters the State court is not bound to take judicial notice.

(3.) *Argu.*—The Federal courts have not exclusive jurisdiction of actions in behalf of assignees in bankruptcy. If their rights are not regarded in the State courts, their remedy is under the 25th section of the Judiciary Act.

THIS was a writ of error to the district court. The defendant, who was sheriff of the county, had, in his character as such officer, taken the property here in question upon attachments issued to him out of the State court against Loeb & Company, a partnership.

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Afterwards Loeb, who was the only member of the firm, voluntarily applied to the district court for his discharge from his debts under the Bankrupt Act. The plaintiff was appointed his assignee; and thereupon brought in that court this action, which was detainue for the goods attached and held by the defendant as sheriff and under the writs.

The defendant moved the district court to dismiss the suit for want of jurisdiction. This motion was granted, and the plaintiff having duly excepted, he sued out this writ to reverse the order.

Section 14 of the Bankrupt Act, after providing for an assignment of the bankrupt's effects by the judge or register, says, that such assignment shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of said proceedings."

Mr Gillmore, for plaintiff in error.

Mr Rankin, for defendant in error.

MR JUSTICE MILLER.—If the matters set forth in the plaintiff's petition are true, which we are here to assume, the title to the goods attached vested in the assignee as soon as the assignment to him was executed. And with this title he acquired a right of immediate possession. This possession he could recover in a court of justice. But to what court should he apply? Had this property

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the possession of a party who could not shelter behind the jurisdiction of a court of law, unless by the Federal court would have had jurisdiction of the case. It would then have been within the terms of the 1st and 2d sections of the act. Does that circumstance take the case out of the statute?—that is, does the fact that, at the time the bankruptcy proceedings were instituted, the property was in the hands of the sheriff, under attachments issued out of the State courts, deprive the Federal court of its jurisdiction?

The property is held by the sheriff under writs rightfully issued, and his possession is the possession of the court by the command of whose writ he seizes it. And so long as the proceedings, in virtue of which it was taken, are pending, that possession will not be interfered with by any other court.

This general principle has been acted upon in England in many cases in which two courts of concurrent jurisdiction were sought to be brought into collision. *Payne v. Drew*, 4 East., 523; *Evelyn v. Lewis*, 3 Hare, 472; *Russell v. East Anglian R. Co.*, 3 M'Naughton & Gordon, 104. By this salutary rule harmony is maintained between the several superior courts of law and chancery, which have co-extensive and concurrent jurisdiction in a great variety of cases. The importance of the rule, and of scrupulously obeying it in this country, is greatly increased by the fact that the Federal and State courts, although exercising their jurisdiction in the same territory, over the same subjects, and often the same classes of litigants, draw their existence from different sources, and are to one another foreign tribunals. In

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no other way can unseemly and mischievous collisions be avoided.

In *Hague v. Lucas*, 10 Peters, 400, property had been taken in attachment by the State sheriff, and released on bail, when the marshal of the United States seized it on execution out of the Federal court. It was held, that the latter could not levy on the property, because it was in the possession of the State court by virtue of its writs first levied. In *Peck v. Jenness*, 7 Howard, 612, the property had been taken in attachment out of the State court, after which the debtor was discharged under the Bankrupt Act of 1841. The question was, whether, under the law, this discharge dissolved the attachment. And it was held that it did not. In *Pulliam v. Osborne*, 17 Howard, 471, it was held that when co-ordinate liens were obtained by one judgment in a State court, and another in a United States court, a seizure by a sheriff under an execution on the former, gave priority over the latter. In *Taylor v. Carryl*, 20 Howard, 583, a vessel had been attached on State process, and afterwards arrested in admiralty. Sales being made in each suit to different persons, the purchaser under the decree in admiralty brought replevin against the purchaser under the attachment proceedings in the State court. It was held that the admiralty process and proceedings and decree and sale were ineffectual to make a title, because that court could not take the property from the State court which had possession of it. And the rule was so held in the similar cases of "*The Oliver Jordan*," 2 Curtis' C. C., 414; *The Ship "Robert Fulton*," 1 Paine's C. C., 620; and in *Freeman v. Howe*,

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24 Howard, 450; *Ex parte* Robinson, 6 M'Lean, 355; *Ex parte* Dorr, 3 Howard, 103; and Buck v. Colbath, 3 Wallace, 334. In the last mentioned case, it is said, that "it is only while the property is in possession of the court, either actually or constructively, that the court is bound or professes to protect that possession from the process of other courts. Whenever the litigation is ended, or the possession of the officer or court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not."

It is claimed that, upon this principle, the motion cannot prevail, because the bankruptcy proceedings, terminating in a discharge of the debtor, operated to discharge the attachments out of the State courts at once, without any order in that behalf, so that the sheriff was left without any authority to hold the property. It may be true that the attachments have ceased to have any binding force. But whether they have or not, is the question; and this question depends, not only upon a proposition of law here urged upon us, but also upon two questions of fact, that is, whether Loeb has been adjudicated a bankrupt; and whether he was the only member of the firm of Loeb & Company. Of the principle of law the State court is bound to take judicial notice; but of the two facts stated, it is not bound to take such notice.

No court is bound to take judicial notice of the proceedings of another court. If material to a controversy before it, it must be informed thereof by the pleadings,

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and if the allegations are denied, they must be proven by the record. The State court can have no knowledge, or even notice, of the proceedings in the Federal court, by which its right to possess and adjudicate the property in question is affected. It should be informed, in a proper way, of those proceedings, before its possession is interfered with or assailed. It would be a violation of judicial comity, and provoke unseemly conflicts, to seize the property out of the hands of its officer, just as much in the case before us, as in the cases cited. Information of these facts, in some proper pleading, must be communicated to the court. If the allegations are denied, they must be proved by the record of the district court. To that record the State court must pay heed, and give effect to the principle of law here insisted on. Then all collision will be avoided, and that comity which, in order to have harmonious action, must obtain between the two jurisdictions, will be secured.

Nor is there any foundation for the idea that the Federal courts have exclusive jurisdiction of such suits in behalf of the assignee. Neither the 14th section, which gives him the right to sue for and recover the estate, debts, and effects of the bankrupt, nor the 1st section, which fully defines the jurisdiction of the district court, declares it to be exclusive in this class of cases. On the contrary, his right to appear in the State court in this case, and there assert his claim to possession of this property, is expressly recognized by the clause of section 14 which authorizes him to prosecute and defend all suits at law or in equity pending at the time of the adjudication of bankruptcy, in which the bankrupt is a party

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his own name. And if the State courts fail to recognize his legal rights, a presumption not here to be indulged, he can, in the proper mode, bring the case from the highest court of the State to the highest court of the United States. *Peck v. Jenness*, 7 Howard, 612.

I am therefore of opinion, that until some action is had in the State court relinquishing possession of the property in controversy, no action can be brought for that possession in any other court.

The judgment of the district court is accordingly affirmed, with costs.

Judgment affirmed.

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RUDDICK, *Plaintiff in error*, v. BILLINGS.

I. THE MODE OF REMOVING CAUSES IN BANKRUPTCY INTO THE CIRCUIT COURT—

1. *Error and appeal*.—Actions at law are removed for review, from an inferior to a superior court of the United States, by writ of error; and suits in chancery, by appeal.

2. *In bankruptcy*.—This distinction is, by the 8th section of the Bankrupt Act, preserved.

3. *Questions of law*.—On a writ of error, no question of fact can be re-examined: only questions of law are subject to review.

4. *Discharge*.—Consequently, a bill of exceptions, embodying the testimony taken in support of, and resistance to, an application for a bankrupt's discharge, which shows no question of law raised or decided on the trial, and an exception only to the final order granting the discharge, does not present a case for review on writ of error.

5. *Amount*.—Whether, upon a contested application of a bankrupt for a discharge, a debt or damages are claimed amounting to more than five hundred dollars, so as to vest in the circuit court appellate jurisdiction, *quære?*

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6. *Writ dismissed.*—To the general rule that the writ of error will be entertained, and the judgment affirmed, unless the record shows some error of which the revisory court can take cognizance, there are exceptions. In exceptional cases, the writ will be dismissed without prejudice to another writ, or to an effectual process to remove the cause.

II. JURISDICTION OF THE CIRCUIT COURT IN BANKRUPTCY.—

1. *Unlimited jurisdiction.*—The second section of the Bankrupt Act confers on the circuit court complete and unlimited control over proceedings in bankruptcy, including the whole case, so that it may be removed from the district court, and also any separate branch of it, or any particular question arising in it.

2. *Process.*—And it may assume and exercise this jurisdiction by bill, petition, writ of error, writ of *certiorari*, or other appropriate process.

3. *Petition.*—It would seem that the proper process by which to remove from the district to the circuit court, an order granting or refusing a discharge, is by petition under the 2d section of the act.

THIS was a writ of error to the district court. It was sued out by Ruddick, a creditor, in order to bring into this court for review an order granting a discharge in bankruptcy to Billings. The proceedings were voluntary, and the discharge was resisted by the creditor on the ground that the bankrupt had, pending the proceedings, made fraudulent entries in his books. A large amount of testimony was taken. No question of law was raised or decided upon the trial, nor in the course of the proceedings. The creditor complained of the order granting the discharge, simply upon the ground that the finding of fact by the district judge was against the evidence. A motion was made on behalf of the bankrupt to dismiss the writ of error.

Section 2 of the Bankrupt Act (14 U. S. Statutes at

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large, 517) provides as follows: "That the several circuit courts of the United States, within and for the districts where the proceedings in bankruptcy shall be pending, shall have a general superintendence and jurisdiction of all cases and questions arising under this act; and, except when special provision is otherwise made, may, upon bill, petition, or other proper process, of any party aggrieved, hear and determine the case in a court of equity. . . ."

And section 8 provides, "That appeals may be taken from the district to the circuit courts in all cases in equity, and writs of error may be allowed to said circuit courts from said district courts in cases at law under the jurisdiction created by this act, when the debt or damages claimed amount to more than \$500, and any supposed creditor, whose claim is wholly or in part rejected, or any assignee who is dissatisfied with the allowance of a claim, may appeal from the decision of the district court to the circuit court for the same district; but no appeal shall be allowed in any case from the district to the circuit court unless it is claimed, and notice given thereof to the clerk of the district court, to be entered with the record of the proceedings, and also to the assignee or creditor, as the case may be, or to the defeated party in equity, within ten days after the entry of the decree or decision appealed from.

. . . "No writ of error shall be allowed unless the party claiming it shall comply with the statutes regulating the granting of such writs."

Mr Rankin, for motion.

Mr Gillmore, *contra*.

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MR JUSTICE MILLER.—The statutes of the United States and the practice in the Federal courts provide two modes of removing causes from an inferior to a superior court: one, a writ of error, and the other an appeal. And that one is to be availed of by an aggrieved party which corresponds with the nature of the case; that is, in an action at common law, the proper process to remove the judgment for review into the superior court, is the writ of error, and in a suit in chancery it is an appeal. If the proceeding appropriate to one class of actions is used in the other, the cause is not removed, and the appellate court is without jurisdiction. Thus, in *M'Cullum v. Eager*, 2 Howard, 61, it was held that a decree in chancery cannot be brought up by writ of error; and in *Sarchet v. The United States*, 12 Peters, 143, that an action at law cannot be brought up by appeal. Very many cases might be cited to the same effect. In *The United States v. Wonson*, 1 Gallison, 5; *Westcot v. Bradford*, 4 Washington, 492; *United States v. Haynes*, 2 M'Lean, 155, the same distinction was maintained in bringing causes from the district to the circuit court.

The 8th section of the Bankrupt Act provides, "That appeals may be taken from the district to the circuit court in all cases in equity, and writs of error may be allowed to said circuits from said district courts in all cases at law under the jurisdiction created by this act." Here the same distinction is retained, and it is enforced in the last clause of the section, which provides, that "no writ of error shall be allowed unless the party claiming it shall comply with the statutes regulating the granting such writs."

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If the order sought to be brought by this writ of error was made in a case at law, and the record presents a question of law for our decision, then that was the proper process for bringing up the record, but otherwise it must be dismissed.

The record brought up by this writ of error contains a bill of exceptions embodying all the testimony taken on the hearing of the application for the discharge of the bankrupt. The reason alleged by the creditor against the application was, that after the commencement of the proceedings, the bankrupt had made fraudulent alterations in his books of account. Upon this question voluminous testimony was taken, but no point of law was ruled by the judge on the hearing. He, in his finding, determined the question of fact thus tried before him in favor of the bankrupt, and awarded to him his discharge. It was to this final order, based on the determination of a simple question of fact, and to this final order only, that an exception was taken. This is the only exception disclosed by the record. Nothing is presented here but questions of fact. Did the defendant make the alleged alterations? Were they important? Were they false? Were they made with a fraudulent intent?

Such a record presents nothing that can be considered on a writ of error. It is well settled that, at the common law, and according to the practice in the Federal courts, no question of fact can be re-examined on writ of error. It may be necessary, to enable the court to see the principle of law, to embody the facts to some extent in the

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bill of exceptions, but it is always the decisions of law that are subject to review, and not the determination of any question of fact. *Burr v. Des Moines Nav. Co.*, 1 Wallace, 102.

But we are presented with another consideration. The statute provides that the circuit courts, by the proper proceeding, may have appellate jurisdiction, when "the debt or damages claimed amount to more than \$500." In determining whether the debtor should be discharged, we have to inquire whether the debt or damages claimed amounted to over \$500. Ruddick proved his debt before the register in the usual manner. It exceeded \$2000, and was not disputed. Neither its validity or amount was involved in the question of the debtor's discharge. No question in reference to it can be here raised. On the other hand, the discharge releases the bankrupt from this debt, and from his legal obligation to pay it to his creditor. The right of the plaintiff to contest the discharge and his interest in the question involved arises out of the existence of this large debt.

The acts of Congress conferring upon the supreme court jurisdiction of cases involving certain amounts, use language somewhat different from that in the Bankrupt Act. They provide that judgments and decrees of the circuit courts may be re-examined in the supreme court, when the matter in dispute exceeds the sum or value of \$2000. It has been held that if the matter in dispute is capable of a money valuation, the case is within the statute, but not otherwise. Accordingly it has been decided that the right to guardianship of an

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infant owning large property was not capable of such valuation. *Ritchie v. Mauro*, 2 Peters, 243; *Barry v. Mercien*, 5 Howard, 103; *De Krafft v. Barney*, 2 Black, 704.

But the right of a person held in slavery to his freedom, has been held to have a money value, and sufficient to support a writ of error. *Lee v. Lee*, 8 Peters, 44. Had this bankrupt been refused his discharge, and the statutes been alike, the case would resemble that of the slave's claim to freedom. But in the Bankrupt Act, the right to review by appeal, or writ of error, depends not on the nature "of the matter in dispute," but on the "amount of the debt or damages claimed." And the question again recurs, is any debt or damages claimed by a creditor who resists the bankrupt's discharge? The point is a very narrow one. No direct authority has been cited to me, and I have not had an opportunity for extended examination. I will not at present express any opinion on the question, as I can decide the present case without doing so. It is sufficient for us to say here that the writ was not the proper process to bring up this record. But it does not follow that such an order should be made as will constitute a bar to another attempt to bring the matter into this court by an effectual and proper process. The general rule undoubtedly is, that the writ will be entertained, and a judgment of affirmance entered, unless the record shows some error of which the revisory court can take cognizance. But to this rule there are exceptions. Thus, in the record of *Burr v. The Des Moines Navigation Co.*, 1 Wallace, 99, there was a paper which was not signed

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by counsel, nor spread upon the record, and therefore was not an agreed statement of facts or case stated; yet, as both parties had so considered it, and had prepared it with the view of obtaining the opinion of the court thereon, and had argued the case in that view, the court dismissed the writ of error, thus leaving the parties at liberty, if they found themselves able to do so, to remove the difficulties in the way of the court reviewing the case, and presenting it again for its consideration.

This leads me to an examination of the 2d section of the bankrupt law, under which it is claimed this writ may be sustained. That section may well be said to be brief and comprehensive.

It would be difficult to use language conferring a more complete supervision over all the proceedings of the district court in bankruptcy than this. There is a general "superintendence," and lest that word might not indicate everything, there is also a general "jurisdiction" conferred. This extends not only to all *cases*, but to all *questions* arising under the act. In other words, the circuit court may remove the whole case and decide on it, or it may assume jurisdiction of any particular question arising in its progress. The mode of exercising this jurisdiction is equally liberal. It may be by bill, by petition, or other process,—that is, by writ of error, by *certiorari*, or any other process by which a case can be transferred from an inferior to a superior court. If any party considers himself aggrieved by the action of the district court in granting the debtor a discharge, he may, under this comprehensive power, be heard in that matter in the circuit court.

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It is not difficult to select such form of proceeding as is proper in the cases as they may arise ; as, for instance, by bill in a suit in equity to avoid a fraudulent conveyance ; or by petition to bring before the court in a summary way some matter, the parties interested in which are before the district court ; or by *certiorari* to bring up some part of the case before its final disposition ; or by any other of the several modes by which the intervention of a superior court in proceedings in an inferior is secured. In fact, such is the difference in the terms of the 8th and 12th sections, the former providing an appellate jurisdiction in "*cases*," the latter a supervision not only of all *cases*, but also of all "*questions*," arising under the act, that it would seem that it is rather under the latter than the former provisions that such a matter as an order granting or refusing a discharge may be brought here for review. But if that be not so, the grant of jurisdiction in that section is ample to authorize the review in this court of such an order, when properly brought here in any of the ways there provided.

To hold otherwise would be to say that one of the most important questions which the district court is called upon to decide, both as it affects the interests of the bankrupt and those of his creditor, is not under the superintendence, nor within the jurisdiction, of the circuit court. Such a view is in direct conflict with the language, and still more with the spirit, of this section.

If a writ of error were, therefore, in the language of this section, "a proper process" to bring up the question, I would entertain the case, and decide it on its merits.

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But I have already shown that for this purpose it is not a "proper process."

As the record, however, exhibits a case which may be brought before this court by petition, or by some other appropriate proceeding, for hearing on its merits, I will not enter an order affirming the judgment of the district court, lest it stand in the way of a revision on the merits, but, exercising the general power of superintendence over the case which belongs to this court, the writ of error will be dismissed at the plaintiff's cost, and he will be remitted to such other proceeding as he may think advisable.

Motion sustained, and writ of error dismissed, without prejudice to such proper proceedings for the removal of the case into this court as the creditor may, under the 2d section of the act, be advised to pursue.

See *In re Alexander*, 8 American Law Register, 423, U. S. Circuit Court, District of Virginia, Mr Chief Justice Chase presiding, in which the supervisory jurisdiction of the circuit court was invoked by petition to review an order of the district court directing a sale of encumbered real estate; and *Langley v. Perry*, *ib.*, 427, U. S. Circuit Court, District of Ohio, Mr Justice Swayne presiding, in which the jurisdiction was invoked by bill to reverse an adjudication of bankruptcy (involuntary); and a note to these cases on page 429, in which the principal case is mentioned, but not with perfect accuracy. See also a well considered article on the jurisdiction of the circuit court in bankruptcy, 7 *ib.*, 641.—[*Reporter*.]

DISTRICT OF NEBRASKA.

NOVEMBER TERM, 1868.

Before Mr JUSTICE MILLER.

ROOT v. SHIELDS.

I. CIRCUMSTANCES SHOWING THAT A PARTY HAD NO INTENTION OF
PRE-EMPTING A TRACT OF PUBLIC LAND.

A party who goes into possession of a small parcel of a tract of government land, under a claim of right inconsistent with a pre-emption claim ; who sells and repurchases the property as town lots ; who, in a document wherein he is required to state his residence, states it as being elsewhere ; who removes, and remains long absent from the land ; and who, from the first, never asserts any pre-emption right to the tract, cannot be deemed to have intended to claim such right.

II. COMBINATIONS TO PREVENT COMPETITION AT LAND SALES AFFORD
NO DEFENCE TO A PARTY NOT INJURED BY THEM.

A party who is not himself injured thereby cannot defeat the title of the purchaser at a sale by auction of public land, by showing that a combination to prevent competition in bidding was formed by means of which persons were prevented from bidding, and the land, worth at the time \$50 per acre, was obtained for \$1.25 per acre.

III. CITY PURCHASING LAND NOT NEEDED FOR ITS CORPORATE PURPOSES—

1. *Rule at common law.*—At the common law, a municipal corporation can take and hold the title to such lands only as its necessities require ; nor can it take the title in another's name, in trust for itself.

2. *Modified by statute.*—This rule is changed in Nebraska by statute.

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3. *Title of trustee.*—The objection at the common law would avoid the trust, and leave the title in the trustee, discharged of all duty to the corporation, and subject to be disposed of by him, if he held by a deed absolute on its face, and paid the consideration, and the trust were evidenced only by agreement between him and the corporation.

IV. PRIORITY OF ENTRY.—A pre-emption entry, not affected by a radical infirmity, will be upheld as against a subsequent purchaser.

V. LANDS NOT SUBJECT TO PRE-EMPTION.—Lands included within the limits of an incorporated town are not subject to entry under the pre-emption law of September 4, 1841 (5 Statutes at large, 453).

1. *Mischief of the act.*—This provision of the statute affords no room for the mischief of including lands within the limits of a city, in order to exclude them from the operation of the law.

2. *Not repealed by organic act.*—The provision is not repealed by the organic act, providing that the legislature of the territory of Nebraska shall not interfere with the primary disposal of the soil (10 Statutes at large, 277).

(1.) *Argu.*—This language has been used for over fifty years in acts admitting new States into the Union, and their power to incorporate towns on the public lands was never questioned.

(2.) *Argu.*—The withdrawal of the lands from the operation of the pre-emption law is the effect of the act of Congress, and not of the municipal charter.

(3.) *Argu.*—The provision of the organic act was aimed at a direct claim of proprietorship on the part of the territory.

3. *The extent of land* which may be included within a city is not limited by the act of May 23, 1844 (5 Statutes at large, 657), providing for the corporate authorities pre-empting for the citizens 320 acres of the town-site.

4. *Policy of provision.*—The provision excepting such lands from the operation of the pre-emption act was inserted, as were other exceptions, to secure to the government the enhanced value of lands in and adjoining a town.

VI. ANSWER AS EVIDENCE.—Circumstances tending to establish a fact, held to be insufficient to countervail the positive denial in the answer.

VII. BONA FIDE PURCHASERS—

1. Although they have purchased without any knowledge, in

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fact, of any defect in their title, yet parties will not be protected as *bona fide* purchasers—

(1.) Who purchased before the patent of the government issued, because, until then, the fee is in the United States, and the pre-emptor and his grantees hold only an equity.

(2.) When the defect arises out of a rule of law of which they are bound to take notice.

(3.) When the title acquired is absolutely void.

THIS was a bill in chancery, filed originally in the district court of the late territory of Nebraska. The plaintiff having had a decree there, the defendants carried it by appeal to the supreme court of the territory, where it was pending when the State was admitted into the Union. The plaintiff being a citizen of Nebraska, and the defendants citizens of other States, the cause was removed into this court, and heard here upon the transcript of the record of the district court, filed in the supreme court.

In 1854, certain parties having associated themselves together as a joint-stock company, under the name of The Omaha City Company, surveyed and platted into lots certain portions of the public lands as an addition to the city of Omaha, and among others, the west half of the south-west quarter of section 10, and the north half of the north-west quarter of section 15, in township 15 north, range 13 east of the sixth principal meridian. This company issued to different parties certificates, setting forth that the holders thereof respectively would be entitled to twenty lots. The defendant Shields was the holder of one of these certificates; and when the company divided the lots among the holders of the certificates, he received ten, situated in block 128½. Under this title he entered

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upon these lots in 1855, and built a house thereon, and ran a fence around them on the line between them and the streets. He lived in this house with his family until June, 1856, when he sold the property to one Beesom, describing it in the deed of conveyance as lots in the above named addition to the town, and by the numbers by which they were designated on this plat, and by which he had drawn them. He then removed to Omaha, where he lived for a while, when he settled on another tract of land in the neighboring county of Sarpy. While residing there, he filed in the office of the register of the land office a written statement of his declaration of intention to pre-empt said lands, under the act of September 4, 1841, and in this declaratory statement he described himself as "of the county of Sarpy." He continued to reside here until September, 1857, when he re-purchased from Beesom the lots above mentioned, they being in the re-conveyance described as in the former deed. The plaintiff alleges that he did this in pursuance of an agreement with, and with money furnished by, the defendant Test, which the defendants deny. He then removed to the property into the house he had previously built, but made no other improvements; and immediately thereupon he filed in the register's office his written declaration of intention to pre-empt the tract first above described, under the act of September 4, 1841, in which statement he alleged a settlement in April 1856, that being the time when he built the house and first removed to the tract. On the 21st of November following, he made proof to the satisfaction of the register and receiver of such matters as are re-

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quired by law to be shown to them to entitle applicants to pre-empt lands; and he took the oath prescribed in that behalf, and entered the land under the act, receiving the usual patent certificate. The bill alleges, and the defendants deny, that this was in pursuance of an agreement between him and Test, and that he should deed a part of the land to him. On the 23d of the same month he conveyed to Test an undivided half of the whole quarter section thus pre-empted by him, as is alleged in execution of said agreement; and in the following January he conveyed the other undivided half to the defendant Smith. After this the commissioner of the general land office returned the case to the local office, and directed a rigid re-investigation of Shield's pre-emption right in the tract. This took place in May; and, upon voluminous testimony adduced in support of and adversely to the right, the local office found against the entry, and so reported to the commissioner. He affirmed this decision, and the parties holding under Shields, in his name, appealed to the Secretary of the Interior, who was at that time the Honorable Jacob Thompson. That officer affirmed the previous decisions; and in pursuance of his order in that behalf, the entry made by Shields was vacated. This was on the 5th of May, 1860: but on the 13th of December, 1861, the Honorable Caleb Smith, having succeeded Mr Thompson in the interior department, without notice to any party, reversed the former decision of his office; decided in favor of Shields' pre-emption right; and directed a patent to issue to him, which was done.

Such was the history of the title as it stood in the

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defendants. The connection of the plaintiff with the title was this: After Mr Secretary Thompson had decided adversely to Shields' right, and after the entry which he in 1857 had made was cancelled, and before Mr Secretary Smith had come into office, the land was by the commissioner ordered to be sold at public auction, on thirty days' notice, as a disconnected tract; and on the 10th of July, 1860, it was accordingly sold, a part to one Monell, and a part to one Smith. Monell did not purchase on his own behalf, but in trust, partly for those who held deeds to lots from The Omaha City Company, and partly for the city. The plaintiff held deeds to some of the lots, and purchased from the city other portions of the tract, and Monell accordingly conveyed them to him.

Between the time Shields conveyed the lots to Beesom and removed from the tract to Omaha, and the time he re-purchased them and returned to his former home, that is to say, on the 14th of February, 1857, the legislature of Nebraska incorporated the city of Omaha. This tract of land, and also some 3000 acres besides, were included within the corporate limits of the city. In March of that year, its authorities, under the act of May 23, 1844, entered at the land office as the town-site 320 acres. From this tract that first mentioned was more than a mile distant. It had never been occupied for any other than agricultural purposes.

The objections taken by the plaintiff to Shields' entry were :

1. That in point of fact Shields never settled on the

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tract, with the view of pre-empting it, until September, 1857; that at that time it was included within the limits of an incorporated city, and, by force of the act, excluded from its operation.

The clause on which this position was rested was as follows :

"Section 10. Every person, being the head of a family," &c., who shall "make in person a settlement upon the public lands," &c., "and who shall inhabit and improve the same, and who has or shall erect a dwelling thereon, shall be and is hereby authorized to enter with the register of the land office," &c., "a quarter section of land, to include the residence of such claimant, upon paying to the United States the minimum price of such land, subject, however, to the following limitations and exceptions: . . . no sections or fractions of sections included within the limits of any incorporated town."

2. That Shields effected his entry for speculative purposes, and in pursuance of a contract previously made with Test to convey a part of it to him: and it was claimed that this avoided the entry, by force of the 13th section, which required every person, before making the entry, to take an oath before the register, that he or she had not "settled on or improved said land to sell the same on speculation, but in good faith to appropriate the same to his or her own exclusive use and benefit; that he or she had not directly or indirectly made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he or she might acquire from the government of the

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United States, should inure, in whole or in part, to the benefit of any person except himself or herself."

3. It was also claimed that the record showed that Shields was the owner of 320 acres of land at the time of asserting this pre-emption right, and was within the exception of the act providing that "no person who is the proprietor of 320 acres of land in any State or territory of the United States, shall acquire any right of pre-emption under this act."

4. It was also claimed that, Mr Secretary Thompson having decided against the validity of the entry, and the land having been offered for sale as government land, at which sale the title was acquired by third parties, it was not within the competency of his successor to summarily reverse this decision, avoid the sale, and issue a patent to Shields.

On these grounds a decree was asked, declaring that the entry by Shields was void, and decreeing that he and his grantees join in a conveyance to the plaintiff.

The defendants insisted that the tract was not within the exception in the act first above mentioned, because :

1. The act of 23d May, 1844, was a repeal thereof by implication. That act provides that the corporate authorities of a city located on the public lands may enter, with the register so much of the town-site as is actually occupied by the town, in trust, for the several use and benefit of the occupants thereof, according to their several and respective interests.

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2. That the construction of the act of 1841 was unreasonable, and involved great inconveniences.

3. That the city was incapable of making this purchase even by a trustee.

4. That the defendants, except Shields, who had parted with all his interest, were *bona fide* purchasers, for a valuable consideration, without notice.

Mr Woolworth, for plaintiff.

Mr Briggs, for defendants.

MR JUSTICE MILLER.—It is necessary to fix the point of time at which Shields first asserted a pre-emption claim to these lands, for in the view which we take of the case, upon that depends the validity of his entry, and of the title which was acquired in virtue thereof. The plaintiff, in his bill, insists that Shields did not conceive the idea of asserting a pre-emption right in the land until September, 1857; and supports that position by a detailed statement of the facts connected with his dealings with and in respect of the tract. On the other hand, the defendants, in their answer, insist that Shields acquired a right to pre-empt the land as early as April, 1856, and that he did nothing subsequently to compromise his claim thereto.

From the first, down to September, 1857, the history of these lands, as conclusively shown by this record, is this: At an early day, almost as soon as Nebraska was opened for settlement, and very shortly after the city of Omaha was planted, certain parties, taking to themselves the style of the Omaha City Company, divided the lands here in dispute into lots, and made a plat of

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them. They did not apportion the lots among themselves, but they issued to third parties certificates, which, upon a distribution afterwards to be made, entitled the holder of each to a certain number of lots. When this distribution among the holders of the certificates took place, Shields held one numbered 416, and drew certain lots in block 128½, and, by exchange of lots with one Mitchell, who, as the holder of another certificate, drew others in the same block, he became possessed of a right (whatever that was) to ten lots all lying together. And by deeds from the company to himself and to Mitchell, and from Mitchell, Shields acquired such a title as could then be made to this parcel of land, consisting of the ten lots. This was before the government had provided any means by which settlers or others could acquire its title to any lands in Nebraska.

It was under this title, or under the right or claim thus derived, that Shields, in 1856, entered, built a house, and took up his residence upon this parcel of the quarter section. It is a significant circumstance, that he built his fence, enclosing the parcel, on the line of these ten lots, and the streets by which they were bounded.

He continued to live here for some time, until he sold out to one Beesom. In the deed which he then made to Beesom, he describes the property sold as so many lots, giving their numbers, in block 128½, in the city of Omaha. Thereupon he removed to Omaha, and afterwards to a tract of land in Sarpy county. Some time in the summer of 1857, he filed with the register of the land office his statement of intention to pre-empt the

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tract of land in Sarpy county on which he lived, and described himself therein as "of Sarpy county." In September of that year, he re-purchases from Beesom the lots in block 128½, and in the conveyance which he received, the premises conveyed are described as lots, as they had been conveyed by him in his deed to Beesom. Thereupon he asserts a right to the whole quarter section.

Passing by all consideration of the relative rights and duties of Shields and the City Company, arising out of the manner in which he went into the occupancy of the lands, and also of the effect of his filing on one tract while maintaining a claim of pre-emption to another, we need here merely direct our attention to the inquiry, what was Shields' intentions in respect of the quarter section, as shown by his conduct? We see him entering into a very small portion of the tract, under an apparent claim inconsistent with the idea of a pre-emption right. We see him selling and re-purchasing the lots as town lots, which can hardly be reconciled with the claim to the tract as agricultural land. We see him, in a most important document, made and filed in a public office, in order to acquire title to another tract, describing himself as residing elsewhere. We see him removing from the land which he here claims, continuing absent therefrom a much longer period than he ever, from first to last, resided upon it, and during all this time he never asserts any claim to the tract under the pre-emption law. When these facts are considered in connection with the requirement of continued and *bona fide* residence on the tract claimed by a settler under the beneficent privileges granted by the pre-emption law,

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the conclusion is irresistible, that he had no idea of asserting, or of having any other rights than such as he had in the lots alone, and under the City Company's deeds. He certainly never asserted any right of pre-emption to the whole quarter section.

Indeed, the force of the facts above enumerated was so strong, that upon the argument the counsel for the defendants was constrained to concede, notwithstanding the allegations in the answer, that it was not until September, 1857, that Shields acquired or asserted a right of pre-emption in the tract.

This matter, then, being disposed of, the other facts, so far as they are necessary to the decision, are undisputed. These are the following :

In February, 1857, the city of Omaha was incorporated. Nearly 3000 acres were included within the corporate limits. The tract here in question was a part of these lands. In September following, Shields filed with the register of the land office his written declaration that he claimed and intended to pre-empt the west half of the south-west quarter of section 10, and the north half of the north-west quarter of section 15, in township 15 north, range 13 east of the sixth principal meridian ; and in November of the same year, he made proof to the satisfaction of the register and receiver of those facts required to be shown by pre-emption claimants, took the prescribed oath, and effected his entry of the tract, and received the usual patent certificate therefor. When the papers in the case were, by the local officers, according to the usual course of such business, transmitted to the commissioner of the general land office, he remitted

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them to the local office with a direction that the right of Shields should be re-investigated. This was done, and, as this record shows, very thoroughly done. It resulted in a letter addressed by the local officers to the commissioner, holding adversely to the validity of the entry, upon several grounds. The commissioner affirmed this decision, and the entry was, in the summer of 1858, vacated. From this decision an appeal was taken to the Secretary of the Interior, who, at that time, was the Honorable Jacob Thompson, and he affirmed the two previous decisions. The lands were thus, so far as the authority of the land department extended, restored to the body of the public domain. Thereupon, and on the 10th day of July, 1860, in pursuance of an order of the commissioner, the local officers sold the tract at public auction, as government land. One Smith bid in one half, and one Monell the other half, of the quarter section. The lands in question in this suit are a part of the half bidden in by Monell. He did not buy for himself, but in trust, partly for persons claiming lots under the deeds of the Omaha City Company, and partly for the city of Omaha. This plaintiff held deeds from this company to some of the lots, and purchased a part of the tract from the city; and Monell accordingly conveyed the lots to him, as a party in trust, for whom the purchase to that extent was made, and the parcel sold to him by the city, by direction of the city. These deeds were made in January, 1861. The plaintiff entered into the premises shortly afterwards, and has expended considerable sums in their improvement.

On the 13th day of December, 1861, the Honorable

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Caleb Smith having succeeded Mr Thompson as Secretary of the Interior, without any further hearing of the parties, and upon the record which was before his predecessor, reversed all the decisions which had been made upon the question of the validity of Shields' entry, and, as a consequence, such action vacated the public sale, and ordered that a patent issue to Shields. Accordingly, on the 24th of February, 1863, without any further proceedings, the patent was issued to him. These are the undisputed facts, and in the view which we take of the case, are sufficient for its determination.

Several objections are urged to the plaintiff's title, to which our attention should be first addressed; for whatever may be the validity of the title alleged by the defendants, if objections may be urged against that of the plaintiff which are fatal to it, no further inquiry is necessary.

One of these objections is, that at the time of the public sale at which Monell purchased the land, he, the plaintiff, and others, entered into a combination to prevent competition among bidders. This allegation in the answer is not supported by proof; but even if it were, it is not matter of defence of which these parties can in this proceeding avail themselves. The charge in the answer is in substance this: That before the sale a large number of persons entered into an unlawful combination to protect Monell in bidding in one half, and Smith the other half of the quarter section, at \$1.25 per acre; that the plans in that behalf of these parties were matured at secret meetings; that the lands were at the time worth \$50 per acre, and this conspiracy was

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formed to defraud the United States of a large sum of money; that these parties attended the sale, many of them armed, and by violent threats intimidated many persons who were desirous of bidding on the lands, so that they did not do so; and thus Monell and Smith were enabled to, and did, bid the lands in at the minimum price.

Now, it is apparent that all that this charge, as made in the answer, tends to, is to show that the United States were defrauded by this proceeding. These defendants did not suffer therefrom. But the United States do not complain. On the other hand, with every means of inquiring into such a matter in their own tribunals, by their own officers, they accepted the sale as a fair one. It was never set aside except as a necessary consequence of reinstating a prior entry. These defendants cannot avail themselves of an injury, which they charge another has suffered, when the injured party not only does not complain, but even affirms the act by which it was inflicted. Especially can they not do so, when they aver such matter, not in support of their own right, but in order to break down the right of their adversaries. *Fackler v. Ford*, 24 Howard, 322.

Another objection urged against the plaintiff's title is, that as the city, as a municipal corporation, was incapable of making this purchase directly, it could not do so indirectly by the aid of a trustee, and therefore the sale to Monell was void. It is true that, at the common law, a municipal corporation can only take and hold the title to such lands as its corporate necessities require. Nor do I think it can do indirectly what it cannot do

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directly. It cannot take the title in the name of another in trust for itself, and thus secure to itself the avails of the void purchase. But in Nebraska that rule does not obtain. It has been changed by statute. It is provided that towns and cities "may grant, purchase, hold, and receive property, both real and personal, within such town, and lease, sell, and dispose of the same for the benefit of the town." In that view the objection is not tenable.

But to what does the objection go? To the trust. Were it valid, it would avoid the trust. The sale itself and the title acquired under the sale, and the conveyance in pursuance of the sale, would all still remain. The estate would be vested in the trustee just as absolutely as if he had purchased for himself. He might have repudiated his obligations to the city as his *cestui que trust*, and yet retain the title to be conveyed and disposed of effectually by him. It is not necessary to inquire what his rights would have been, had he acquired them by a conveyance expressing a void trust on its face. Here we have a conveyance to Monell, absolute on its face, the consideration for which, so far as this record shows, passes from him, and not from the city. The trust is evidenced by an agreement in that behalf between it and him. He took the title. And he has conveyed to this plaintiff. It is not material to inquire whether the trust was valid or not. Irrespective of that question, he took, and he conveyed to this plaintiff, a good title.

It now becomes necessary to inquire whether the title alleged by the defendants under Shields' entry was

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valid. Being prior in time to Monell's purchase, it is to be upheld, unless that entry is affected by some radical infirmity. The facts are very few and simple. They are these :

1. The city was incorporated, and these lands included within the corporate limits, in February, 1857.

2. Shields had no pre-emption claim to them prior to September, 1857.

3. The act granting to him such right, if any he had, provides that a party of the character therein described may pre-empt any portion of the public lands, except such as are included within the limits of an incorporated city.

It does not need a single word to show that the law on its face does not authorize a pre-emption entry of the lands here in question. But it is insisted, on behalf of the defendants, that this exception in the law is inoperative here. One reason alleged is, that the mischiefs of such a provision are so serious that Congress could not have intended the effects which would follow. It is said that the State or territorial legislature, in which rests the authority of incorporating cities, might, by unduly extending their limits, exclude large bodies of land fit only for agricultural purposes from the beneficent operations of the pre-emption act, and defeat the object of Congress.

We do not stop to repeat what has been said a great many times of the duty of the court when applying to a case a provision of a statute, the terms of which are clear and precise, and when urged to nullify it by considerations of mischief growing out of it. Here we

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think the mischiefs are imaginary rather than real. If the local legislature were so unwise as to endeavor to defeat the purposes of a law enacted for the benefit of its constituents, Congress could readily, and certainly would immediately, remedy the evil. And it is not conceivable that the local legislature would ever attempt any such thing.

The pre-emption law was enacted for the benefit of the settlers in the new States and territories. It offers to that adventurous and worthy class of citizens the advantages of selecting, and securing in advance of the speculator, the more desirable tracts in the new region. And the uniform policy of the land department is to retain the public lands in such a situation for a long time, in order to give those who are willing to encounter the hardships and dangers of frontier life, an opportunity to make selections and to settle upon them, and make payment for them at the minimum price, before any portions of such lands are offered to purchasers in general. Accordingly, such settlers constitute almost the whole body of citizens who settle in such regions. It is not conceivable that they would deliberately devise a measure which would defeat an enactment by which valuable privileges are secured to themselves, and by which the region of country in which they live would be populated and improved. Precisely this argument was urged in the case of *Gilman v. Philadelphia*, 3 Wallace, 713, 731. It was held untenable there, for the reasons indicated above.

It is insisted that the clause in the law containing this exception is repealed by the provision in the act

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organizing the territory, that its legislature should not have authority to interfere with the primary disposal of the soil. It is said, that if the territorial legislature can, by incorporating a city, withdraw the lands included within its limits from the privileges of pre-emption, it may, and it does, thereby interfere with the primary disposal of the soil. This argument is specious rather than sound. If the provision of the organic act has the effect claimed, it is because it repeals the provision of the pre-emption law by implication. Between these two provisions there is no such repugnance that they cannot both stand. So that we cannot imply a repeal of the former by the latter. *United States v. 10,000 Cigars, ante.*

This provision in the act is the same as is found in most of the acts admitting new States into the Union. It is intended to withdraw from the local legislatures some special matter of general concernment, and indicates a settled policy in respect thereof.

In 1802, in the act admitting Louisiana, the words used were, "They," that is the people of the new State, "for ever disclaim all right or title to the waste or unappropriated lands lying within the said territory; and the same shall be and remain at the sole and entire disposition of the United States" (2 Statutes at large, 642). And the very phrase here employed by Congress appears in the act for the admission of Michigan, passed on the 15th of June, 1836 (5 Statutes at large, 59), and will be found in all similar acts since passed. Having its origin in some reason of general application, it has been felt as a necessary, and adopted as an approved, provision in the legislation of Congress.

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One or two considerations will disclose this.

To incorporate a city located on the public lands, however contracted its limits, is to withdraw from the operation of the pre-emption law lands included within them. If including public lands within the limits of an incorporated city is an interference with the primary disposal of the soil, then the new States cannot pass an act incorporating a city located on the public lands. But this power in the States was never denied. It has always been exercised by them exclusively of the Federal government. Indeed, the legislation of Congress concedes the power. So it cannot be that incorporating a city on the public lands interferes with the primary disposal of the soil, even though it has the effect to withdraw the lands within its limits from the operation of the pre-emption law.

I have thus far spoken of the power of States, and am reminded that the charter of Omaha was enacted by a territory. But we have already seen that the provision has its place in acts admitting States, as well as in acts organizing territories; and that it is universally used, on account of a general policy. So the argument in the one case is of equal force in the other.

An act incorporating a city which is located on the public lands, does not, by its own force, withdraw lands from pre-emption. That effect is produced by the congressional provision, and is remote, indirect, and only consequential.

These obvious considerations show very clearly that when Congress provided that the territory should not interfere with the primary disposal of the soil, it did not

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intend to deny the authority to incorporate a city on the public lands.

But this exception in the pre-emption law was not inserted with any view whatever to the extent of the corporate limits of a city, whether they should be reasonable or unreasonable. It was assumed that there was a class of lands which the local authorities would regard as more desirable for town occupation than for agricultural use. Without any inquiry as to the correctness of the opinion on that subject of those who were on the ground, and without convenient means of answering such an inquiry, Congress deemed the short way the best way,—to exclude them all from the operation of the act by a general rule. And when, with such a provision of statute before it, and with such obvious reasons for enacting it, Congress proceeded to organize the territory with the clause which is before us, it is unreasonable to suppose that it intended to repeal or modify the former rule.

The clause in the organic act was intended to forbid the territorial legislature passing any law to dispose of the public lands as if on its own authority, or intermeddling with the mode by which the general government should dispose of them, or assuming any authority or jurisdiction in respect of that business. It was not intended to deny authority to pass a law which the territory alone could intelligently enact.

Clearly the position of the defendants on this ground is untenable.

But we are met by still another reason against giving effect to the exception in the pre-emption law. It is, that the act of May 23, 1844 (5 Statutes at large,

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657), restricts the corporate limits of a city to 320 acres.

All that that act provides, so far as the matter here in hand is concerned, is that any portion of the public land actually occupied as a town-site, may, to the extent of 320 acres, be by the corporate authorities entered at the proper land office and at the minimum price, in trust for the occupants. Prior to the passage of that act, there was no mode provided for the occupants of such towns acquiring their titles except at the public sale.

The public sales of lands are often delayed long after a large section of territory has been opened for settlement. This is in order to enable settlers to enjoy the preference in acquiring the more valuable tracts. And these sales are made in parcels of not less than 40 acres each, and therefore do not afford an appropriate means to claimants of small lots for acquiring title thereto. Congress accordingly provided this mode of relief to such parties, expressly restricting the advantages which it granted to lands actually occupied, and to 320 acres. The *status* of the remaining lands within the corporate limits was untouched. They could not be entered under this act, nor could they any more after than before the passage of it be pre-empted by an individual. The title to them could only be acquired at public sale.

No one of the reasons urged on behalf of the defendants against giving effect here to the clear and express provision of the law, that lands within the limits of an incorporated city should not be subject to pre-emption, are tenable. But if we look to the policy of the provision, we are led to the same conclusion.

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Whenever a town springs up upon the public lands, adjoining lands appreciate in value. The reasons are obvious, and the fact is well known. So too when a railroad is built through a section of country, the same result follows. So too in respect of lands which have been reserved for the use of an Indian tribe, when the Indian title is extinguished, the same may be said. While such lands are held as a reserve, population flows up to their boundaries and is there staid; it of course constantly grows more and more dense, so that when the reserve is vacated, the lands have increased in value, and are always eagerly sought after. The other classes of lands mentioned in the exception, as for instance those on which are situated any known salines or mines, have some intrinsic value above others.

Now all these classes of lands are excepted from the operation of the act, and for the one common and obvious reason, that being of special value, the government desires to retain the advantage of their appreciation, and is unwilling that any individual, because of a priority of settlement, which certainly can be of but brief duration, should, to the exclusion of others equally meritorious, reap benefits which he did not sow.

This is as true of lands within the limits of an incorporated city, as of any other of the classes mentioned in the exception. And it is no answer to this view to suggest that lands thus excluded from pre-emption are not occupied for a town. They are included within its limits by the local legislature, because likely to be required for such occupancy. And it is this fact, and their proximity to the town, which gives them special value.

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This very circumstance of their situation brings them into the classes of lands mentioned.

The lands were not, at the time Shields first asserted a pre-emption claim thereto, subject to entry under the act, and the entry which he made was illegal and void.

It is also insisted against the validity of this entry, that Shields personally was within one of the exceptions which relate to the character of the pre-emption claimant, and was therefore incapable of making an entry under the act. It is alleged that he was the owner of 320 acres of land. This is denied very positively in the answer. The proof consists of many circumstances tending, it is claimed, to establish the fact. Perhaps so. But against the denial it is not conclusive.

Again, the entry is assailed on the alleged ground that he entered into a contract with Test, by which the title which he should acquire should inure to Test's benefit. It is insisted that Shields re-purchased the property from Beesom with money furnished to him by Test for the purpose, and that circumstance, taken in connection with the further fact that he conveyed an undivided half of the quarter section to Test, the second day after he made his entry, support the allegation. But we have here, too, the positive denial in the answer, which we think is not overcome by the plaintiff's proofs. It is unnecessary to decide these questions. Let it be understood that we place our decree upon the ground that the land was not subject to pre-emption, and that for that reason the entry made by Shields was void.

It is further insisted on behalf of the defendants, that they are *bona fide* purchasers, and that they, as such, are

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entitled to the protection of the court. I think it pretty clear that some at least of these defendants purchased and paid their money without any knowledge in fact of any defect in the title. Yet they are not *bona fide* purchasers, for a valuable consideration, without notice, in the sense in which the terms are employed in courts of equity. And this for several reasons.

They all purchased before the issue of the patent. The more meritorious purchased after the entry had been assailed, and decided against by the land office. But that is a circumstance not material to this consideration. Until the issue of the patent, the legal title remained in the United States. Had his entry been valid, Shields would have taken only an equity. His grantees took only an equity. They did not acquire the legal title. And in order to establish in himself the character of a *bona fide* purchaser, so as to be entitled to the protection of chancery, a party must show that, in his purchase, and by the conveyance to him, he acquired the legal title. If he have but an equity, it is overreached by the better equity of his adversary.

Besides, these defendants were bound to know the law. They were bound to know that these lands were within the limits of the city; and that lands within the limits of a city cannot be pre-empted. Knowing these facts, they knew that Shields' entry was void. They did not purchase without notice.

Again, the defect in the title was a legal defect; it was a radical defect. It was as if no entry had ever been made. By it Shields did not take even an equity. After he had gone through the process of making the entry,

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after he received the patent certificate, Shields had no more right, or title, or interest in the land than he had before. And as he had none, he could convey no interest in the land. By the deed which he made, and by the successive deeds which they received, his grantees took no more than he had, which was nothing at all.

In order to the maintenance of this defence, there must subsist an interest which the law approves and will support, and we have shown in this opinion that that never existed.

There must be a decree according to the prayer of the bill.

Decree accordingly.

As to form of decree to be entered in such a case, see *Silver v. Ladd*, 7 Wallace, 219.

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COMMON CARRIER OF PASSENGERS, BAGGAGE, AND GOLD—

1. *The case of the Orange County Bank v. Brown*, 9 Wend., 116, distinguished.

2. *If a passenger surreptitiously* introduce into a coach an article of great value, with the view of getting it carried for nothing, when the carrier is accustomed to charge for such service, he is guilty of a gross fraud, and in case of loss cannot recover.

3. *But if, notwithstanding* the passenger's intention to defraud him, the carrier learns the fact, and, knowing it, charges, and the passenger pays, for carrying the article as extra baggage, and

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for charges usual therefor, then the carrier is liable for the value of the article, in case of its loss.

4. *It is for the jury to say*, from the whole evidence, whether the carrier received the compensation knowing the baggage to contain gold.

HELLMAN & CAHN, partners, sued Holladay for \$10,114, for gold dust of that value, lost while being transported on the defendant's stages. The circumstances, as detailed in the petition, were, briefly stated, these:

The defendant was the proprietor of a line of stages and of a treasure express, running from Great Salt Lake in Utah *via* Denver in Colorado, to Omaha in Nebraska. Cahn took passage at Salt Lake for Omaha, and paid the usual fare, being \$300; and having a quantity of gold dust, the defendant undertook to carry that for \$5 per \$1000 extra, which said Cahn then and there paid. Near Fort Bridger this gold dust was lost off the coach, by reason of the unskilful driving of the coach by the defendant's driver, who became intoxicated; and also because the gold dust was placed in the boot of the coach, and not there properly secured.

To meet this case, the defendant in his answer alleged, that his "treasure express" was conducted by means of messengers, who accompanied all articles to be thereby carried, and used iron safes, and other precautions for carrying them safely, and the charges on articles so carried were at the rate of \$50 per \$1000; that all passengers on the coaches were advertised of that fact, and that the defendant would not be responsible for, and forbade the carrying of gold dust by passengers, because

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the line ran through a country little frequented, and where exposures to robberies and Indian attacks were great; that said Cahn introduced the gold dust into the coach surreptitiously, and paid for it as extra baggage, without informing the defendant's agents, and without their knowing that it was valuable; that Cahn placed his baggage in the boot of the coach, and gave to the driver the liquor by which he was intoxicated.

The suit was originally commenced in one of the district courts of the late territory of Nebraska, and on the organization of the Federal courts in the State was transferred to this court on account of the citizenship of the parties. At this term, it came on to be tried before the court and a jury.

It appeared from the evidence that there were several passengers on board the coach, travelling in company with the said Cahn; that they had with them a large quantity of gold dust, for which, neither as treasure nor extra baggage, did they pay anything at Salt Lake City. They had proceeded in the stage some forty miles to a station known as Millersville, when the general superintendent and the local agent of the stage line came to the coach and told them that telegrams had been received from Salt Lake, that they had extra baggage; that the baggage must be weighed, and they must pay for whatever exceeded 100 pounds to the passenger, at prescribed rates as extra baggage. A good deal of baggage was taken out, weighed, paid for, and replaced.

The plaintiffs introduced evidence tending to prove that

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at this time Cahn told the general superintendent that he had the gold dust here sued for, and before his eyes placed it in a carpet-bag, and the driver placed it in the boot; that he paid for it as extra baggage, with the full knowledge on the part of the defendant's agents of its nature.

The defendant showed by the evidence the manner in which he carried treasure, the rates charged by him therefor, and the notice to passengers limiting his liability, as charged in his answer. He also introduced evidence tending strongly to show that the gold dust was surreptitiously and fraudulently introduced into the coach by Cahn at Salt Lake; that his agents neither there nor at Millersville knew his baggage contained articles of such value; and that he or his companions, with his assent and even encouragement, gave to the driver the liquor which he drank; and that he placed the carpet sack in the boot of the coach, or caused the driver to place it there, without knowing its contents.

The defendant requested the court to instruct the jury (among other things) as follows:

“ If the jury believe from the evidence that Cahn assisted or encouraged his fellow passengers in getting the driver drunk, that he caused him to put the carpet-bag containing the gold dust in the boot of the coach, the driver not knowing that it contained gold dust, that he surreptitiously introduced the gold dust into the coach at Salt Lake, to avoid paying the rates chargeable in the express, and at Millersville paid for it as extra baggage

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only, and at the rates chargeable therefor, then you will find for the defendant."

Messrs Redick & Briggs, for the plaintiffs.

Mr Poppleton and *Mr Woolworth*, for the defendant.

MR JUSTICE MILLER.—I cannot give this request as drawn. There is evidence here which it ignores. It was evidently framed with the purpose of shutting out from the consideration of the case certain evidence introduced by the plaintiff. The credibility of that testimony is not for us to pass on. It is for the jury. The jury must be instructed upon the law as it stands on the whole of the evidence. The testimony which I refer to as not taken account of in the request is, that of the plaintiff tending to show that when the payment was made as for extra baggage, the defendant's agents knew that the carpet sack contained gold dust, and knowing that fact, charged for it only the rates usual for extra baggage.

I agree with the defendant's counsel that if Cahn introduced the gold into the coach secretly at Salt Lake, and attempted to get it carried for nothing, he was guilty of a gross fraud. If that were the whole of the case, he could not recover here. In this view of the case, it may upon the authorities be doubtful even whether it is incumbent to bring home to Cahn notice that the carrier would not be liable for gold thus carried. In that view the case would, without any evidence, show an intentional concealment in order to escape payment for a service rendered to the passenger by the carrier. That would be a fraud; and the law would not aid the party practising it. It would be a fraud by which the pas-

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senger, without payment, would secure an advantage, and if he could recover for a loss, it would be a great advantage. It would be forcing a contract on a carrier which he did not make.

The case of *The Orange County Bank v. Brown, 9 Wend., 116*, is precisely in point. A traveller on a steamboat on the Hudson river took \$11,250 to be carried for the plaintiff. He placed it in his trunk, which, with its contents, was lost on board. The plaintiff sought to recover the money as lost baggage. Mr Justice Nelson, in an able opinion, held that this amount of money was too large to come under the head of "baggage," and that an attempt to have it carried free of reward under the cover of baggage was an imposition upon the carrier, and that he was deprived of his just compensation, and subjected to unknown risks by such devices.

But that case and the many others in which it has been followed, is distinguishable from this in the particulars which I have mentioned. Here there is evidence tending to show that the carrier knew that the baggage contained the gold. If he did, he was not deceived. Cahn may have intended to deceive and defraud him. If he did, he failed to do so. If the carrier knew that the carpet sack contained the gold, and took not the usual rates chargeable for gold, but only such as were chargeable for ordinary extra baggage, then he was not defrauded. The *Orange County Bank* case proceeds throughout on a state of facts which, as the plaintiffs claim, differs from that shown here. Whether they are right, we must leave it to the jury to say. This instruction does not do so, and we cannot give it as requested.

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The other matters referred to in the request are properly submitted to the jury.

I will give the request modified according to the views I have expressed.

The jury returned a verdict for half of the sum claimed, thus dividing the loss between the parties.

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DISTRICT OF IOWA.

MAY TERM, 1869.

Before MR JUSTICE MILLER and MR DISTRICT JUDGE
LOVE.

MANNY v. DUNLAP.

I. AGENCY TO PROCURE INSURANCE—

1. *Verbal contract.*—A direction by a principal to his agent to procure a policy of insurance is not satisfied by a verbal contract for insurance.

2. *Agent liable.*—If an agent has undertaken to procure insurance, but has done it so negligently that a loss which occurs is not covered by the policy, he is liable to his principal.

3. *Negligence.*—If an agent to procure a policy of insurance merely makes a verbal contract for insurance, and a loss occurs, his principal cannot be put to uncertain and expensive resource of a suit on such contract against the insurer, but the agent must make good the loss.

4. *Surrogation.*—If he have a valid verbal contract, he must pay his principal, when he will be entitled to an assignment of it, or may sue on it in the name of his principal.

THIS was a motion for a new trial. The facts sufficiently appear in the opinion of the court.

MR JUSTICE MILLER.—This is a motion for a new trial, founded on alleged erroneous instructions to the jury. The plaintiff, who was the owner of certain reaping and mowing machines, directed her agent by letter to procure a policy of insurance on them, with specific instructions

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as to the amount to be insured on each machine, and the time for which the insurance should run. No policy was executed, but the agent, who is defendant in this action, had some conversation with the agent of an insurance company, which, taken in connection with certain arrangements between them concerning money on deposit by one with the other, is claimed by the defendant to constitute a valid contract of insurance.

From the testimony, these facts are quite clear, that after the defendant received orders to insure, and before the machines were burned, about twenty-five days elapsed; that the defendant had available means of plaintiff's with which to pay the premium; and that, at any time during these twenty-five days, if he had called at the office of the insurance agent, and insisted on it, he could have received a policy which would have covered the loss.

The machines having been destroyed by fire, the insurance agent denied that he had made any insurance on them, and, if his testimony in the case is to be credited, he had not. The present action was brought to recover the value of the goods destroyed, and is founded on the neglect of the defendant to effect the insurance which he had been ordered to obtain. The jury were instructed, that if the defendant had money of the plaintiff's with which to pay the premiums, and if he could have done so by the use of reasonable diligence, it was his duty to have insurance made by a *written policy of insurance*; and that such duty was not performed by a verbal agreement or understanding for insurance between the defendant and the insurance agent. And the court refused to leave it to the jury to say whether a valid verbal con-

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tract of insurance had been made, or to consider that question further.

If these rulings are sound, the verdict must stand; if they are erroneous, it should be set aside.

In this discussion, I would premise that the defendant received express instructions in writing to procure a "policy of insurance," a form of expression which is not satisfied by any verbal contract, though such contract may possibly be a valid one. I am not inclined to believe that this fact is material, otherwise than as showing that the defendant was without excuse in anything in the language of his instructions. I think that a direction by the owner of property to his agent to insure, would require an insurance by written policy, because that is the usual mode among prudent persons of doing the thing ordered. And I am further of opinion that a court is bound to know judicially that no prudent and ordinarily careful man would for twenty-five days rely upon a verbal agreement for insurance, when, on any day of the twenty-five, he could without trouble or difficulty have received a policy.

The duties of agents are well understood. Those of an agent to procure insurance have been often considered by the courts, and are rigidly enforced. It has been decided in general terms that when an agent has undertaken, or it has become his duty, to insure, and without good reason he has neglected to do so, he is liable for all loss which may occur, that would have been covered by the policy. To this effect, among many other cases, are the following: *Wilkinson v. Coverdale*, 1 *Espinasse*, 75; *Morris v. Summerl*, 2 *Wash. C. C. R.*, 203.

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Again, if the agent has undertaken to effect insurance, and has done it in a manner so negligent or unskilful that a loss which occurs is not covered by the policy, the agent is liable therefor. Story on Agency, § 218; *Mallough v. Barber*, 4 Campbell, 150. In *Wilkinson v. Coverdale*, above cited, the ground of action was, that defendant having sold plaintiff certain premises, had promised to have his policy renewed for the benefit of his vendee. He did have it renewed, but neglected to have such indorsement made thereon as was necessary to enable the plaintiff to avail himself of it in case of loss. Lord Kenyon was of opinion that there was negligence sufficient to have made the defendant liable, if he had in fact promised to renew for plaintiff's benefit; but no such promise could be shown in proof, and there was a nonsuit. The case, however, shows his lordship's sense of the strict diligence required of one undertaking to procure insurance for another. In *Callender v. Oelrick*, 5 Bingham's New Cases, 58, it appeared that defendants were agents for shipping plaintiff's corn, and undertook to use, and did use, their endeavors to effect insurance according to the instructions of plaintiffs. Their efforts were unsuccessful, but they never informed plaintiff of their failure. The wheat was lost, and it was held that the agents were liable to plaintiff for their neglect to notify him of the failure to obtain insurance.

In the case under consideration, plaintiff had a right to insurance effected in the usual safe and secure manner, the more especially as he had instructed his agent to effect it in that manner. When a loss has occurred, the agent cannot be heard to say, "I did not do what

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you directed, nor as a prudent and cautious man under similar circumstances would do for himself. I departed from your instructions for my own convenience. But I have effected a valid insurance for you, and though its enforcement is uncertain, difficult, and costly, and though the contract is denied by the other party, and I have no other proof than my own oath, I insist on your accepting this as a discharge of my duty, and looking to the insurance company, instead of to me, for indemnity." The plaintiff cannot be thrown upon this uncertain and expensive resource. He had a right to a written contract, which would surely bind the company; and if he has failed to obtain this through the negligence of defendant, the latter must make good the loss. If he has any such valid contract as he alleges, let him pay plaintiff, and he will be entitled to an assignment of it, or to sue on it in plaintiff's name for his own benefit. The result of such a suit will be, as it ought to be, at the risk of defendant.

These views are fully sustained by what was said by Mr Justice Washington, in the case of *De Tastett & Co. v. Cronsillat*, 2 Wash. C. C. R., 132. "The law," he remarks, "is clear, that if a foreign merchant, who is in the habit of insuring for his correspondent here, receives an order for making an insurance, and neglects to do so, or does so differently from his orders, or in an insufficient manner, he is answerable, not for damages merely, but as if he were himself the underwriter, and he is of course entitled to the premium."

The motion for a new trial is overruled, and judgment must be entered on the verdict.

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DURANT v. SUPERVISORS OF WASHINGTON
COUNTY.

RIGGS v. SUPERVISORS OF JOHNSON COUNTY.

I. BUT ONE PROCESS FOR CONTEMPT TO GO AGAINST ALL MEMBERS
OF A BOARD OF OFFICERS—

1. *Disobedience of Mandamus.*—When a *mandamus* is awarded, directed to a board of officers composed of several members, commanding the performance of an official act by them as a board, and they do not obey it, but one writ of attachment should go against them for this contempt.

2. *Consolidation.*—If more than one writ is issued, and each is entered as a separate case, they will be consolidated.

II. COSTS WHEN SEVERAL WRITS ARE ISSUED—

1. *Of marshal and clerk.*—When a separate writ for attaching each member of the board has been issued, the marshal and clerk will be allowed their costs in each case.

2. *Of district attorney.*—The district attorney is entitled to but one fee for all the cases arising out of one writ of *mandamus*.

(1.) *Argu.*—The statute provides that he shall have but one bill of costs in several proceedings which should be joined.

(2.) *Argu.*—He should know when they should be joined, and if not joined at the outset, he should move for their consolidation ; if he fail to do so, he can have nothing by reason of his neglect of duty.

III. PROCEEDINGS FOR CONTEMPT OF COURT—

1. *Character.*—Prosecutions for contempt of court are criminal in their character, the United States being plaintiff.

2. *District attorney to appear.*—Whenever the vindication of the authority of the government requires it, the district attorney should appear in such proceedings.

JUDGMENTS having been rendered against certain counties by this court, *mandamus* was awarded to each creditor, addressed to the supervisors of each county by name, commanding them to levy and collect a tax

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sufficient to raise the money to pay the judgment. They declined to do so. At the last term, attachments were ordered by the court to go against them, to be returnable to the present term. Writs of attachments were framed and issued against each supervisor by name, so that, for the contempt of the board in disobeying one writ of *mandamus*, several processes of arrest went; and they were served accordingly. This action against each individual thus proceeded against was docketed as one case.

The district attorney appeared in each to prosecute it. The costs were taxed by the clerk in each case, without regard to the other cases.

Motion was now made to consolidate all the contempt proceedings, based on one *mandamus*, and to retax the costs.

MR JUSTICE MILLER.—Several questions are presented in this case, which we will dispose of in their order.

The first arises on the motion to consolidate the cases.

The proceeding in which this motion is made is an attachment for contempt, against the supervisors, for failing to obey a writ of *mandamus* issued by this court. In fact, there were two writs issued at the instance of different relators, directed to the same board of supervisors. No special order was made by the court as to the manner of issuing the attachment for contempt; and the clerk, under instructions from the relators, or in accordance with what he believed to be his duty, issued a separate writ in each *mandamus*, for each individual supervisor, making two writs of attachment against each of the defendants, and as many sets of attachment as

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there are supervisors. The cases are docketed as cases of the United States against each individual.

We are of opinion that the cases of all the supervisors charged with contempt of one writ of *mandamus*, are proper subjects for consolidation into one. The order which the supervisors were required to execute was one order; the action required of them was joint action; and it related to but one subject matter. Their guilt or innocence of the charge of contempt has its foundation in the same duty and the same disobedience; and though there may be varying defences or excuses, and a difference in the degree of guilt, the hearing together of these matters is quite as consistent and appropriate as the trial of the guilty and the innocent, charged in the same indictment, with the vilest crime; or as the trial in one civil action of many persons charged as joint trespassers. The truth is, that, as a principle, they are jointly and severally guilty, and may be jointly or severally tried, as convenience and the discretion of the court may determine. In the cases before us, we are of opinion that justice and convenience will be subserved by a consolidation of all which relate to the disobedience of the same writ of *mandamus*, and we shall order that they be thus consolidated.

If it shall become necessary in future to issue attachments for contempt in this class of cases, but one writ should issue for the contempt incurred under each *mandamus*; all who are attached for disobedience to that mandate being included in the one writ.

We see no reason, however, for retaxing the costs of the marshal and clerk. The cases are of that character

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which allows of presentment jointly or severally. There is no reason to believe that the clerk acted otherwise than as he believed to be right. He should not be deprived of the fees, already earned, as allowed by law.

The case of the marshal is still stronger. There was placed in his hands a separate writ of attachment against each man, issued under the seal of the court. He had no part in framing the process, nor could he refuse to serve it. The only question is, what does the law allow him for such service? It is not claimed that too much is taxed for any of the services rendered, if the cases are to be treated as individual. That such is the case until they are consolidated, we have already shown.

The only limitation to the marshal's right to recover full fees for each writ which he serves, is to be found in the proviso to the 1st section of the act of 1853 (10 U. S. Statutes, 144). It is there provided, that where, at the instance of the same parties, more than two writs are to be served on the same person, the marshal shall be entitled to mileage for two writs only. As there are here no more than two writs served upon any one person, this provision is obviously inapplicable.

A more difficult question is, whether a fee of \$10 is taxable in each of these cases, in favor of the United States attorney for this district. Our first impressions were strongly adverse to this claim. The members of this court do not know of an instance in which such claim has ever been asserted, either in the State or Federal courts. Nor are we aware of any instance in which the attorney for the government has appeared to present a

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case for contempt, originating in the refusal of a witness or other person to yield obedience to a writ issued in a suit between private parties.

We are satisfied, however, upon consideration, that a prosecution for contempt of court is a criminal proceeding, in which the government is interested as plaintiff; and that, whenever it becomes necessary for the government's attorney to appear to vindicate its authority as represented in the courts, it is his duty to do so.

It only remains to ascertain what provision the statute has made for his fees, in a case in which he properly appears. One of the provisions of the statute is, that whenever two or more indictments, suits, or proceedings, which should be joined, are or shall be prosecuted, the district attorney shall be paid but one bill of costs for all of them.

Now we have just held that all of these cases, which relate to the same writ of *mandamus*, should be joined; and have given effect to that view by ordering a consolidation. We have also given directions concerning the manner of issuing such writs in future. So far as the clerk and marshal are concerned, this can affect their fees for future services only. But it is obvious that the statute intended that the district attorney should have but one bill of costs in all cases which should have been joined, without reference to whether they are consolidated or not. It establishes a rule in reference to his fees, but does not do so in regard to those of the clerk and marshal. The obvious reason is, that he is supposed to know when cases should be joined, and, if such cases are not originally united, that he should move for their

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consolidation. If he fails to do this, and the matter is brought to the attention of the court, he can have only such fees as he would have been entitled to if they had been so brought or consolidated.

The result of these views is, that for the attachments growing out of each *mandamus*, the district attorney is entitled to one fee of \$10, and no more. Most of the parties attached, and some under each *mandamus*, are still before the court for future action.

No fee will be taxed for the attorney in the cases of those parties who have been discharged with a nominal fine at this term. When the cases yet before us are finally disposed of, one fee of \$10 will be taxed for him in the cases as consolidated under each *mandamus*.

DISTRICT OF NEBRASKA.

MAY TERM, 1869.

Before Mr JUSTICE MILLER and Mr DISTRICT JUDGE
DUNDY.

SWATZEL, *Administrator*, v. ARNOLD.

I. PLEADING IN EQUITY—

1. *Amendment*.—The general rule is, that matters existing at the time of filing the bill, but omitted therefrom, and appearing necessary to the case, should be brought before the court by amendment.

2. *Supplement*.—Matters pertinent to the case, arising after the bill is filed, should be brought before the court by way of supplement.

3. *Facts occurring after bill filed*.—Before answer, it is in some cases admissible to charge matters arising after filing the bill, by way of amendment, instead of by supplement.

II. FUNCTIONS OF FOREIGN ADMINISTRATOR—

1. *Accounting*.—An administrator appointed by the court within whose jurisdiction a decedent was at his death domiciled, is entitled to receive from the administrator appointed in another jurisdiction in which there are assets, what may remain after paying the debts of the estate therein.

2. *Rights ex officio*.—Such administrator is, by virtue of his character as such, and the statute of Nebraska, entitled to administration in Nebraska.

III. FOREIGN ADMINISTRATOR'S RIGHT TO SUE, AND ALLEGING GRANT OF ADMINISTRATION BY AMENDMENT AFTER SUIT BROUGHT—

1. *May sue before taking out letters*.—An administrator appointed in one State, like an executor who has not proved the will, may sue in the courts of another, before he has letters

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therefrom ; and having obtained letters, may aver the fact by amendment.

2. *His interest.*—He has an interest in the subject matter, although he has no standing in court, and for that reason may support his suit in order to defend his right by authority afterwards acquired.

3. *Change of character.*—This is also sustainable on the principle that a party, suing in one capacity, may amend by asserting a claim in another, even though subsequently acquired.

ON the 12th of March, 1864, John Swatzel filed his bill of complaint in the district court of the late territory of Nebraska, for the county of Washington. The object of the bill was the foreclosure of a mortgage upon lands situated in that county, executed by Anselm Arnold, the ancestor of the defendants, to Joseph Parks, the intestate of the plaintiff. The bill alleged the appointment of the plaintiff as administrator of Park's estate, by the probate court of the county of Johnson, in the State of Kansas. On the 25th of April, 1864, the defendants demurred to the bill, on the ground that the plaintiff, not having been appointed administrator by any court in Nebraska, was incapable of maintaining the suit. The court in which the suit was brought sustained this demurrer. Thereupon the plaintiff obtained leave of the court to file an amended bill. This he did on the 18th of May, 1865. The allegations of new matter in the amended bill were as follows: "That afterwards," that is, after the appointment of the plaintiff as administrator of Park's estate by the Kansas court, "on or about the 8th day of August, A.D. 1864, your orator, the said John Swatzel, was, on application to the probate court of said county of Washington, in said territory of

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Nebraska, duly appointed administrator of the estate of said Joseph Parks, deceased ; that he at once qualified, and is the acting administrator of the estate of Joseph Parks within said territory." The parties plaintiffs in the suit being citizens of the State of Missouri, and the parties defendants citizens of the State of Nebraska, the cause was, upon the admission of the latter State into the Union, and the organization of the State and Federal courts therein, removed into the United States circuit court. On the 14th day of December, 1868, which was after the removal of the cause into said court, the defendants filed their demurrer to the amended bill, and as cause therefor alleged, that the appointment by the court in Nebraska of the plaintiff as administrator, after the commencement of the suit, was ineffectual to maintain the same, and that the objection successfully urged by them to the original bill was likewise fatal to it as amended.

Mr Woolworth, for defendants.

Mr Briggs, for plaintiff.

MR JUSTICE MILLER.—In this case the plaintiff brought, in the district court of the late territory of Nebraska, his suit as administrator of the estate of the decedent, Joseph Parks, to foreclose a mortgage. His only claim to sue as administrator rested on his appointment by the probate court of the county in the State of Kansas in which the decedent was domiciled at the time of his death. A demurrer to this bill was sustained in the court in which it was brought, on the ground that the plaintiff could not maintain his suit because he had not

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been appointed administrator by any probate court of the territory. The plaintiff asked leave to amend, and after this procured letters of administration in the territory, and filed his amended bill setting up that fact. On the organization of separate State and Federal courts, the cause came here, because the parties were citizens of different States. The defendants have, in this court, demurred to the bill as amended.

Two propositions are relied on in support of the demurrer:

1. That if the matter set up in the amendment is admissible at all, it can be brought in only by supplemental bill.

2. That as it appears that the plaintiff had no right of suit at all when the original bill was filed, and now attempts to assert a right acquired since the first demurrer was sustained, he can do this only by a new and independent suit.

It is certainly a general rule in equity pleadings, that matters existing at the time the bill was filed, which, being omitted in the original bill, are important to the plaintiff's case, are to be introduced by an amended bill; and that matters pertinent to the case occurring after the bill is filed are to be brought before the court by supplemental bill. This constitutes the essential difference between the two classes of bills we have mentioned. If the matter of the amendment had been alleged by way of a supplemental bill, it would have conformed to this rule, and this would seem to have been the more appropriate form of pleading. But before answer, it is often proper to allege in the amended bill pertinent matter

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occurring after the filing of the original bill. Story's Eq. Pl., § 885.

The entire method of pleadings in chancery in the Federal courts, is taken from the high court of chancery in England, and the system of pleading in that court was based largely upon the decisions of the chancellors and the practice which had grown up under them. In some respects, this system was not a little artificial and conventional, though, as a whole, deserving of much of the praise it has received.

In the case of *Humphreys v. Humphreys*, 3 Peere Williams, 349, a demurrer had been sustained to a bill in chancery, because the plaintiff, who claimed in right of her deceased father, had not sued as administratrix, and, in fact, no administrator had been appointed. Subsequently to the allowance of the demurrer, she had taken out letters of administration, and it was held by the Lord Chancellor, that she might set up that fact by an amended bill, though it was objected to on the ground taken in this case. The Lord Chancellor said, that the mere right to have an account of the personal estate was in the plaintiff, Helen, the daughter, as she was next of kin to her father, and it was sufficient that she had now taken out letters of administration, which related to the time of the death of the intestate, just as where an executor brings a bill before proving the will, and his subsequent proving the will makes such a bill a good one, though the probate be after the filing thereof. Whereupon his lordship resisted the plea as one for delay, and held that the taking out of letters of administration might be charged either by way of supplement or amendment.

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The analogy between this case and the one before me is close and obvious. It is attempted to distinguish them by the circumstance that the rights claimed in the case cited were under a will; and it is said that an executor may do many things under a will before it is proven. But the distinction fails, because there the executors named in the will were both dead, and had never proved the will, and the right of the plaintiff in that case, as in this, to maintain the suit, depended solely upon the letters of administration granted after the suit was brought and first set out in the amended bill. And aside from the special circumstances of that case, the principle in respect of administrators and executors suing in courts foreign to the jurisdiction in which they obtain their letters, is precisely the same. In *Dixon's Executors v. Ramsey's Executors*, 3 Cranch, 319, the rule laid down by the court in respect of foreign administrators is applied to foreign executors.

The case before cited also goes to the second proposition; for the plaintiff here, before the administration granted in Nebraska, stood very much in the same position that the plaintiff there did, namely, having an interest in the subject matter of the litigation, and no standing in court to assert it.

The present plaintiff, as administrator of the domicile, had a right to receive for final distribution the sum due on the mortgage. He had an inchoate right to be appointed administrator here, and if any one else had been appointed, that person would have been liable to account to him for what was in hand after paying the debts in this jurisdiction. *Stevens v. Gaylord*, 11 Mass.,

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255; *Harvey v. Richards*, 1 Mason, 381; *Burn v. Cole*, Ambler, 415; *Somerville v. Somerville*, 5 Ves. Jr., 791.

In order to establish the position that this matter could not be shown by amendment, the alleged incapacity of the plaintiff must be so radical that the defendants could not waive it, but whenever, in the progress of the cause, it came to the notice of the court, it would dismiss the suit. This is not the case. The objection is to the character of the parties, and had it not been taken by demurrer or plea, but a general answer had been filed, it would have been considered waived (see 39th Rule in Equity). The cause would have proceeded without regard to the objection. This is apparent from one or two considerations. It is well settled that a voluntary payment to the administrator of the domicile, by a foreign debtor, is a good acquittance to such foreign debtor. *Doolittle v. Lewis*, 7 Johnson's Ch., 49; *Stevens v. Gaylord*, 11 Mass., 256; *Dawes v. Head*, 3 Pickering, 128; *Davis v. Esty*, 8 Pickering, 475; *Harvey v. Richards*, 1 Mason, 381. This could not be done if the administrator's authority for all purposes is confined to his jurisdiction. The impediment to the exercise of the full powers of an administrator in a jurisdiction foreign to that granting his letters, is essentially technical and formal, and should not be strained beyond its necessary application. *Yeaton v. Lynn*, 5 Peters, 224.

The incapacity of the foreign administrator not being radical, so as to entirely deprive him of power to proceed with his cause, the fact of his taking out letters in this

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State, was matter which he might aver by amendment, and maintain his suit thereon.

The demurrer is overruled.

See Noonan v. Bradley, in the U. S. supreme court at the December term, 1869, 9 Wallace, 394.—[Reporter.]

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JOHNSON v. MONELL.

I. REMOVAL OF CAUSES FROM STATE TO FEDERAL COURTS UNDER THE 12TH SECTION OF THE JUDICIARY ACT—

1. *Citizenship*.—Under the provisions of the 12th section of the Judiciary Act (1 U. S. Statutes at large, 79), the right of removal was granted only to a defendant who was an alien, or a citizen of a State other than that in which the suit was brought.

2. *When right should be claimed*.—It was incumbent on the defendant to claim the right at the time of entering his appearance in the State court.

II. REMOVAL OF CAUSES UNDER THE ACT OF MARCH 2, 1867—

1. *By either party before final trial*.—The act of March 2, 1867 (14 U. S. Statutes at large, 558), allows to a plaintiff as well as to a defendant the right of removal, and he may exercise it at any time in the course of the litigation prior to final hearing or trial.

2. *Conditions*.—The only conditions on which the right depends are—

(1.) *Parties*.—That the controversy shall be between a citizen of the State in which the suit is brought, and a citizen of another State.

(2.) *Amount*.—That the matter in dispute exceeds \$500, exclusive of costs.

(3.) *Affidavit*.—That the non-resident citizen shall file an affidavit stating that he believes, and has reason to believe

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that from prejudice or local influence, he will not be able to obtain justice in the State courts.

(4.) *Security*.—That he give the requisite security for his appearance and filing copy of the record in the Federal court at the proper time.

III. THE ACT OF 1867 IS CONSTITUTIONAL—

1. *Constitutional provision*.—The sentence in the constitution which confers on the Federal courts jurisdiction over causes arising under the constitution and laws of the United States, confers on the same courts jurisdiction over causes between citizens of different States. The terms are as broad in one case as in the other.

2. *Twenty-fifth section of Judiciary Act*.—Under the 25th section of the Judiciary Act, ever since the organization of the Federal judiciary system, jurisdiction has been exercised over the former class of cases, after the final judgment in the highest courts of the State.

If that has been rightful, then the right of removal at any stage of a cause must be rightful.

IV. THE TERMS OF THE ACT CONSIDERED—

1. *A voluntary change of residence* by a party, so that jurisdiction on account of citizenship arises, even if made after the suit was brought, does not affect the right of removal.

2. *It is only a question of costs*, as a plaintiff, after his voluntary change of residence, might discontinue in the State court, and bring his action in the Federal court.

3. *The intent* with which a person removes from the State, in the courts of which a suit is pending to which he is a party, so that by reason of citizenship the Federal courts may have jurisdiction, and he be enabled to remove the cause thereto, is not an objection to the removal, provided his citizenship in another State be real.

ON the 14th day of February, 1868, the plaintiff brought his suit in the district court of the State of Nebraska against Gilbert C. Monell, who was a citizen of that State, and John J. Monell, who was a citizen of the State of New York, claiming \$37,500, for his damages by reason of the non-performance by

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the defendants of a contract entered into between the parties. At that time the plaintiff was a citizen of Iowa, but during the litigation he became a citizen of Nebraska. Afterwards he again voluntarily changed his residence and citizenship from Nebraska to Iowa. He continued to prosecute his cause in the State court. Gilbert C. Monell was duly served with process, and appeared and answered. But John J. Monell was never served, and never appeared. At the July term, 1868, in the State court, the cause was tried by a jury, who rendered a verdict for the plaintiff for \$14,700. The defendant then moved for a new trial, on the ground that the verdict was not supported by the evidence. The motion was granted, and a new trial awarded. The cause being in this attitude, the plaintiff filed his petition in the State court for a removal of the cause into the United States circuit court.

The petition for the removal shows that the plaintiff was a citizen of Iowa when the suit was brought in the State court; that he became a citizen of Nebraska while it was pending, and was so when it was tried; and that, after this, by a voluntary change of residence, he became, and at the time he made his application for a transfer of the case to this court, was again a citizen of the State of Iowa. The defendant G. C. Monell is, and during the pendency of the suit has been, a citizen of Nebraska, and the other defendant has never been served with process, nor appeared, and is a citizen of New York.

The affidavit of the plaintiff, on which the motion of the State court was founded, further states, that the amount in controversy exceeds \$500, and that he has

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reason to believe, and does believe, that, from prejudice or local influences, he will not be able to obtain justice in that court.

This petition is based on the act of March 2, 1867 (14 U. S. Statutes at large, 558), which provides, "That where a suit is now pending, or may hereafter be brought, in any State court, in which there is a controversy between the citizen of a State in which the suit is brought, and a citizen of another State, and the matter in dispute exceeds the sum of \$500, exclusive of costs, such citizen of another State, whether he be plaintiff or defendant, if he will make and file in such State court an affidavit stating that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State court, may, at any time before the final hearing or trial of the suit, file a petition in such State court," and have the suit removed to the Federal court.

Mr Doane, for the motion.

Mr Wakely, *contra*.

MR JUSTICE MILLER.—This case is transferred to this court by an order of the State court in which it was originally brought, on motion of the plaintiff, made after a verdict of the jury in his favor had been set aside by the court. The defendant G. C. Monell now moves to dismiss the case, or to send it back to the State court, on the ground that this court has no jurisdiction in the premises.

Removals of suits from the State courts, on the ground of citizenship of the parties, were until recently governed

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exclusively by the 12th section of the Judiciary Act (1 U. S. Statutes at large, 79). By the provisions of that act, the right of removal was limited to a defendant who was an alien, or a citizen of a State other than that in which the suit was brought, and who asserted his right at the time of entering his appearance in the State court. Here the plaintiff claims the removal, and he does so after the parties have, as citizens of the State in which the suit was first brought, litigated it to a jury trial, a verdict, and an order of the court setting aside the verdict and granting a new trial. The citizenship on which this right is founded is obtained by his voluntary change of residence after all this is done. This is such a wide departure from the restrictions by which Congress had heretofore guarded the right of removal, and the proposition that a party instituting the litigation in the State court, and pressing it to the point here mentioned, can, by his own voluntary change of residence, acquire a right to remove the case from the forum of his own selection, is so startling, that nothing short of the clearest evidence that Congress had both the power and the intention to grant such a right, will justify this procedure.

The act of March 2, 1867, which is relied on in support of our jurisdiction, works very important changes in the principles heretofore governing the rights of parties to remove causes from the State courts into the Federal courts. For the first time, it allows a plaintiff to remove the suit from the tribunal of his own selection. It also allows this to be done either by plaintiff or defendant, in a certain event, in any stage of the

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litigation prior to the final hearing or trial. The only conditions necessary to the exercise of the right of removal are :

1. That the controversy shall be between a citizen of the State in which the suit is brought, and a citizen of another State.

2. That the matter in dispute shall exceed the sum of \$500, exclusive of costs.

3. That the party, citizen of such other State, shall file an affidavit stating that he believes, and has reason to believe, that, from prejudice or local influence, he will not be able to obtain justice in the State court.

4. That he give the requisite surety for appearing in the Federal court at the proper time, with copies of the papers.

The first question is, had Congress the competency to enact such a statute? The judicial power of the United States, as defined by the constitution, extends to controversies between citizens of different States, as well as to all cases in law or equity arising under the constitution and laws of the United States; and the former is given by the same section, and in the same sentence with the latter. The jurisdiction of cases arising under the constitution and laws of the United States has, under the 25th section of the Judiciary Act, been exercised after final judgment in the highest courts of the States, ever since the government was organized. The constitutionality of that act was drawn in question in *Martin v. Hunter's Lessee*. The cause had been brought up to the supreme court under the act, and the judgment of the court of appeals of the State of

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Virginia reversed. A mandate being sent to the latter court, it refused to carry into execution the judgment of the supreme court, on the ground that its appellate power did not extend to the judgments of the State court; and that, so far as the act attempted to confer the jurisdiction, it was unconstitutional. The question was thus precisely made, and in a most serious exigency. The determination was in favor of the constitutionality of the act, and the jurisdiction of the court. From that time to the present, at every term of the court, cases have been heard and determined under the authority of the 25th section of the Judiciary Act without question.

If a case of that character can be removed by a party who has submitted, without objection, to the jurisdiction of the State court, and after final judgment against him, I do not see why the jurisdiction of the Federal courts dependent on citizenship may not be asserted at any time before final judgment. The power, as conferred by the constitution, is as full in one case as in the other. The case presented by the act is a controversy between a citizen of the State where the suit is brought and a citizen of another State. The jurisdiction conferred by the constitution is even broader than this, for it extends to controversies between citizens of different States, while by the act it is limited to a controversy in which one of the parties is a citizen of the State in which the suit is brought. The act is therefore within the constitutional power of Congress.

The next question is, whether the fact that, pending the litigation in the State court, the plaintiff changed

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his citizenship from Nebraska to Iowa, stands in the way of the removal of the cause?

The act does not in terms prescribe the time at which the citizenship of the moving party must be acquired. Nor is there anything from which to imply that a time was intended to be limited in that regard. Had Congress intended to confine the privileges of the act to parties who were citizens of different States at the commencement of the suit, it would have been very easy so to have provided. It did not see fit so to do. On the other hand, in express terms, or at least by the strongest implication, it provided otherwise. The language is, "Where a suit is now pending, or may hereafter be brought, in any such court in which there is a controversy between a citizen," &c., which is as much as to say, whenever a controversy shall arise in a suit pending in a State court, the parties to which shall at any time be citizens of different States, the cause may be removed. No time at which the citizenship shall be acquired is limited. So the inference is that it may be acquired at any time.

Nor is the case changed by the circumstance that the citizenship in Nebraska was abandoned, and that in Iowa acquired voluntarily, or even for the purpose of securing the right of removal. It has been repeatedly held that the fact that a party had removed from one State to another in order to be able to bring his suit in the Federal court, did not affect the jurisdiction. ✓

Thus, in *Briggs v. French*, 2 Sumner, 251, Mr Justice Story says, "It is every day's practice for a citizen of one State to remove to another State, to ✓

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become a citizen of the latter in order to enable him to prosecute suits and assert interests in the courts of the United States. And provided the removal be real, and not merely nominal, and he has truly become a citizen of another State, I have never understood that his motive for the act is inquirable into, or, if his motive is to prosecute a suit in the courts of the United States, that such a motive would defeat his right so to sue. It might be a circumstance to call in question the *bona fides* and reality of the removal or change of domicile. But if the new citizenship be really and truly acquired, his right to sue is a legitimate, constitutional, and legal consequence, not to be impeached by the motive of his removal."

So here the fact that this plaintiff changed his citizenship voluntarily, and in order to be able to effect a removal of his cause while it was pending in the State court, does not affect his legal right. With all our preconceptions on the subject of the limited circumstances in which the right of removal has been heretofore exercised, we are not at liberty to say that Congress has, under the act of 1867, annexed any other conditions to its exercise than those mentioned. If it be said that it is extraordinary to allow the plaintiff to remove the cause in an emergency created by his own voluntary act, it may be replied, that it is only a question of costs, for he can discontinue his case in the State court, and bring a new suit for the same cause of action in this court.

It may be further said, that his right of removal is not wholly dependent on his own volition, for he must make oath to a condition of things which, in his belief, pre-

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vents him from having a fair trial in the State court. And in this respect the act gives him, on account of his citizenship, only the same right to remove the trial to the Federal courts which plaintiffs have in the State courts to change the venue from one county or district to another.

I am therefore forced to conclude that Congress intended, in reference both to plaintiffs and to defendants, to confer the right of removal from the State courts, in all cases where the amount in controversy exceeds \$500, at any stage of the proceedings before the final trial is begun, and when the requisite citizenship is found to exist, on the applicants making the proper affidavit as to prejudice and local influence, and giving the required bond.

The case before us comes within this rule, and was properly transferred to this court by the order of the State court.

The motion is therefore overruled.

Motion overruled.

DISTRICT OF KANSAS.

OCTOBER TERM, 1869.

Before Mr JUSTICE MILLER *and* Mr DISTRICT JUDGE
DELAHAY.

SAMUEL v. HOLLADAY.

I. EFFECT OF A BYE-LAW OF DIRECTORS OF A CORPORATION—

1. *As to third parties.*—A bye-law adopted by a board of directors of a corporation, providing how special meetings of the board shall be called, does not affect third parties dealing with the corporation.

2. *Ratification.*—Proceedings of the board of directors at a special meeting not called in the manner prescribed by the bye-law, may be subsequently ratified by the corporation.

II. THE LEX LOCI CONTRACTUS.—A contract of a corporation relative to personal property will be governed by the law of that State in which it is incorporated, and has its principal place of business, and within which the property is situated and the contract was made.

III. THE ACT OF KANSAS RELATIVE TO THE FORECLOSURE OF MORTGAGES CONSTRUED.—It was the intention of the legislature to provide in this act—

1. *That mortgages of real estate* should be foreclosed by proceedings in the court of the county in which the premises are situated.

2. *That all deeds of trust*, whether of real or personal property, should be foreclosed in the same manner as mortgages.

3. *That all foreclosures*, whether of mortgages or deeds of trust, and whether of real or personal property, should be by action in the courts under the code of civil procedure.

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IV. A CORPORATION IS A NECESSARY PARTY TO A SUIT TOUCHING THE CORPORATE PROPERTY—

1. *A corporation* which has conveyed its property in trust to secure a debt, retains the real ownership, although the legal title and right of possession is in the trustee. It is a necessary party to a suit to vindicate its rights in respect of such property as against a wrong-doer.

2. *No decree will be rendered* against a wrong-doer which will leave him exposed to a subsequent suit for the same matter.

3. *The corporation* is the only party which can settle a matter touching the corporate property. Through it the interests of its creditors must be worked out. It also represents the shareholders, who are only entitled to the surplus assets remaining after the payment of its debts.

V. OF STOCKHOLDERS SUING TO PROTECT THE CORPORATE PROPERTY—

1. *When their interest is small.*—A suit brought by two shareholders on behalf of all similarly situated who may come in to prosecute, which has been pending six years, without any other shareholder coming forward, when their interests are trifling compared with the whole number, will not be directed to stand over to add parties.

2. *A case not entitled to favour.*—A bill is not entitled to the favorable consideration of the court which is filed and prosecuted by stockholders who do not show affirmatively that they have paid for their stock, in order, without the concurrence of the company, to recover corporate property, which has been sold after a notice of four months, during which time neither they nor the directors nor the company endeavored to pay the debt on account of which the sale was made, or otherwise prevent its taking place.

3. *Dodge v. Woolsey*, 18 Howard, 331, considered. The following propositions are established by this case :

(1.) In the case of an incorporated company, with capital stock divided into shares, which are held by individuals, the corporation and the shareholders are distinct legal persons, and can sue and be sued by each other.

(2.) When the directors of such corporation have misapplied a portion of its funds, to which a shareholder has a distinct right—*e.g.*, a dividend—he may recover the amount so misapplied, and if this has not been effected, but only threatened, he may enjoin it.

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(3.) When a corporation, or its rights of property, is threatened with an injury, such as a court of equity will enjoin, but refuses to take legal steps to protect its rights, a stockholder may maintain a bill against the party threatening the mischief and the corporation, to restrain the commission of the act, in order to protect his interest from immediate damage.

(4.) No *dictum*, in this opinion, goes the length of asserting that when a corporation has a cause of action against a party, an individual stockholder may prosecute it simply because the corporation refuses to do so.

THE Central Overland California and Pike's Peak Express Company was incorporated by the legislature of the territory of Kansas, with an authorized capital stock of \$1,000,000, represented by shares of \$100 each. It was, among other things, authorized to, and it did, establish, maintain, and operate a line of stages, running from Leavenworth and Atchison, in Kansas, to certain towns in Colorado, and thence to Great Salt Lake city, in Utah. By the charter, the management of its business was intrusted to a board of directors, not less than three, nor more than nine, in number; and by one section, the directors were empowered "to make and prescribe such bye-laws, rules, and regulations as they shall deem proper respecting the management and disposition of the stock, property, and estate of the company."

A set of bye-laws were accordingly adopted by the directors, among which were the following:

"Special meetings may be called by the president. . . . The purpose and object of such meetings shall be stated in writing by the parties calling the same, and filed with the secretary of the company.

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“ Written or printed notice, either by personal service, or by mailing the same directed to his usual or reputed place of business, paying the postage on the same, of all special meetings of the board of directors, shall be given to each director. At no special meeting shall any other business be introduced except that referred to in such notice, unless with a consent of a majority of the whole board expressed by their votes at said meeting.”

These provisions of the charter and of the bye-laws being in force, and when the whole number of directors was seven,—that is, on the 5th day of July, 1861,—a special meeting of the board, attended by five of its members, was held at the company's office in Leavenworth. The meeting was called verbally about twenty-four hours before it convened. At this time the corporate property, consisting of animals and vehicles, stations and buildings scattered along its stage route, and used in the course of its business, was of the value of about \$500,000; and it had a contract for carrying the United States mail over its route, from which it was to receive annually \$475,000 in quarterly payments. But its affairs had become seriously embarrassed, and Holladay had advanced to it considerable sums of money, and had become liable as indorser and acceptor of its paper for considerable sums further, in all amounting to about \$200,000.

At this special meeting, by the unanimous vote of all the directors present, the president was authorized to execute to Holladay a bond and deed of trust upon all the corporate property, to secure him on account of the said advances and liabilities, and for such further sums as he should thereafter advance, and such further liabili-

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ties as he should thereafter assume. Accordingly, on the 22d day of November, 1861, the president made to Holladay a bond of the company for the payment of all sums which he had become or should become liable for, and of all sums which he had paid or should pay on its account, and also made to Theodore F. Warner and Robert L. Pease a deed of trust in the name of the company, conveying all its property, including the contract for carrying the mail. In this deed of trust it was provided, that if the company should make default in the performance of the condition of the bond, the trustees, Warner and Pease, upon Holladay's request, should take possession of all the property conveyed, thereafter continue the business, and, upon a notice of twenty days, to be advertised in a newspaper published at Atchison, sell all the property, and out of the proceeds pay what was going to Holladay, and render the surplus to the company. There were a number of stringent provisions in the deed of trust not necessary here to state.

Holladay claiming that default had been made in the condition of the bond, on the 6th of December the trustees took possession of the line, business, and property of the company, and advertised a sale for the 31st of December. The sale was adjourned from time to time, and at length took place on the 22d of March, 1862, when Holladay was the purchaser for \$100,000. He thereupon took possession of the line, business, and property, and continued to run the stages and to perform the mail service, and receive the amount coming therefor, until long after this suit was brought. The bill charges, and the plaintiffs claimed, that the proofs supported the

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charges against him, the trustees, and the president, of many acts of fraud and oppression; but in the view taken of the case by the court, they were not material.

After the property thus came into Holladay's possession, the directors of the company, being advised of the proceedings, continued to treat with him as if what had been done was regular, and tacitly, and by some affirmative acts, recognized his rights and claims under the deed of trust.

These plaintiffs were stockholders in the company, Samuel holding 381 shares, the number held by Street not appearing. Nor did it appear that either of them ever paid up the assessments on their shares, or otherwise had a pecuniary interest thereunder; while, on the other hand, it appeared that the company's debts, including some \$200,000 due to Holladay, exceeded the value of the property sold to him. On the 1st of April, 1862, these plaintiffs applied to the board of directors, at a regular meeting held on that day, to institute legal proceedings to protect the company's rights and interests in the property, and to recover the possession of it, which request was refused; for which reason these plaintiffs, as stockholders of the company, bring this suit on their own behalf, and on behalf of all others similarly situated, who shall come in and contribute to the expenses of the suit.

The bill was filed July 7, 1862. It prays an injunction restraining the said Holladay from disposing of the property, and a decree declaring the deed of trust and the sale thereunder to be void, and restoring the property to the corporation. The company was named as a de-

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fendant in the bill, but was never served with process, and never appeared. No injunction was ever applied for; and pending the suit, Holladay disposed of the property to third parties.

The cause was heard on pleadings and proofs.

Mr Crozier, for the plaintiffs.

Mr Stringfellow, for the defendants.

MR JUSTICE MILLER.—This is a bill in chancery, brought by the plaintiffs, as shareholders in the Express Company, against the corporation and others, and especially against Ben Holladay.

The ground of the complaint is this : That the Express Company made a deed of trust to Pease and Warner, nominally to secure to Holladay certain sums of money which he had advanced to it; that a sale of the property thereby conveyed was made by the trustees to said Holladay; that the deed was illegal, because, as is alleged, it was not authorized by the company; that even if the deed were valid, the sale under it is void, because no sufficient notice of it was given, and because it violated a statute of the State of Kansas, and because property of the value of over \$500,000 was sold for \$100,000. There are also specific charges of fraud against Holladay, made to avoid both the deed and the sale. The plaintiffs claim that they, as stockholders, have a right to ask relief for these grievances in a court of chancery, because the corporation has refused, although requested by them, to take any steps in that direction. The relief prayed for is : That the deed of trust, which is called a mortgage, be decreed null, and the sale fraudu-

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lent and void; that the property be restored to the Express Company; and that the defendants, except the Express Company, be restrained from proceeding to sell or dispose of the property under the mortgage, and from using or in any way interfering with it; and that the complainants have such other and further relief as the nature of their case may require.

It is very obvious that much of the specific relief here asked is now impossible. It appears that the sale of the property under the deed of trust was made on the 22d day of March 1862, and the bill was not filed until the 7th of July following. The property was delivered to Holladay on the day of sale. No injunction or other order has been made concerning its custody up to the present time, a period of six years. It consisted of horses, coaches, and other personal property, appropriate to carrying the mail, and to the carrying business generally, over the route indicated by the name of the corporation. A decree to enjoin the use of that property, or for its restoration to the company, or to prevent interference with it, would be nugatory, because no such property can now be found.

But if the deed of trust should be declared void, or the sale under it invalid or fraudulent, a liability may, under some circumstances, be found to exist on the part of Holladay, or of the trustees, to account for the property or its proceeds. We therefore proceed to inquire whether this, the only relief in the power of the court to grant, is sustained by the case made by the plaintiffs, and by the rules of equity jurisprudence. It is charged that the deed of trust is void, because the meeting of the board

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of directors at which the president of the company was authorized to execute such an instrument was held without the notice prescribed for such meetings by the bye-laws of the company. This point has been much urged in argument, but it cannot prevail.

1. Such a bye-law, when made by the board of directors for their government, cannot be extended to effect contracts with third persons. There are many cases in which it has been held that notice of special meetings must be given as required by the bye-laws, or the meetings would be wholly without authority, and all business attempted to be then done would be of no binding force upon the corporation. *Kynaston v. The Mayor of Shrewsbury*, 2 Strange, 1051; *King v. Theodorick*, 8 East., 543; *Stow v. Wyse*, 7 Conn., 214; *Warner v. Mower*, 11 Vermont, 385; *State v. Ancher*, 2 Rich. S. C. 245. But in all these cases, and in the others in which the same rule is laid down, the bye-laws were made by the stockholders at the annual or stated meeting, under the authority and direction of a provision of the charter. In such case the stockholders may be supposed to retain a control over the management of their affairs, and intend to put a restraint on their agents. Their will, expressed in the bye-law, becomes a rule to the directors. *Brick Presbyterian Church v. The Mayor, &c., of New York*, 5 Cowen, 538. It cannot be disregarded any more than a provision in the charter.

But the reason for the rule fails when the bye-law is made by the directors for the government of themselves in the management of the business of the corporation. The same power which enacts can repeal the law. It is

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merely a guide for their own convenience, and for the orderly conduct of their business. It cannot be extended to effect the validity of their acts done in disregard of it, especially when third parties are concerned. The *Mechanics' and Farmers' Bank v. Smith*, 19 Johnson, 115; *Seneca County Bank v. Lamb*, 26 Barb., 595; Com. Dig., "Bye-law," c. 2; *Dodwell v. The University of Oxford*, 2 Vent., 33; *Vandine, Petitioner*, 6 Pickering, 187; *Sargent v. The Essex Marine Railway Corporation*, 9 *ib.*, 201; *Commonwealth v. The Mayor of Lancaster*, 5 Watts (Penn.), 152.

2. The notice given of the meeting was a substantial compliance with the bye-law. The fact that a fair notice of the meeting, and of the object for which it was called, was given to each director who was within reach, is conceded. It is quite immaterial how that notice was given, whether verbally or by a formal written notice. *Rex v. Grimes*, 5 Burr., 2601; *Rex v. Carlisle*, 1 Strange, 386; *Savings Bank v. Davis*, 8 Conn., 191.

3. There is ample evidence of the ratification of the proceedings of the meeting by subsequent acts of the board of directors. The rule is very well settled, and is supported by abundant reasons, that where, at a meeting of a board of directors of a corporation formed for purposes of pecuniary profit, an act is ordered to be done without objection either then or subsequently made to the regularity of the meeting by any director or stockholder, and the act thus authorized is afterwards performed, its legality cannot afterwards be questioned in a suit in equity on the ground of irregularity. Thus, in *Leavitt v. Yates*, 4 Edwards, 134, it was held that a

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deed of a corporation executed pursuant to the direction of a quorum of the directors, no objection being taken at the time nor afterwards by any member of the board, must be considered as the corporate act, whether the meeting was duly convened or not. *Bank of the State of Alabama v. Comegys*, 12 Ala., N. S., 772; *Williams v. Christian Female College*, 29 Mo., 250; *Port of London Assurance Co.'s Case*, 35 Eng. L. & Eg., 178; *Hoyt v. Thompson*, 19 New York, 207.

There are some objections taken in the bill to the terms of the deed of trust, but these were properly abandoned on the argument.

We are therefore of opinion that the deed of trust is a valid instrument, and that the acts of the trustees, in taking possession of the property and conducting the operations of the Express Company according to its terms, were legal and proper.

But to the sale and its validity, objections of a more formidable character are urged. This company was incorporated by the legislature of the territory of Kansas. The property affected by this deed of trust was personalty, and the most of it was located in this State. The principal place at which its business was conducted was in this State. The deed of trust was executed, acknowledged, and recorded, and the sale under it was made, in this State. The instrument, the powers which it confers, and the acts done under it, must be governed by the laws of this State.

A statute of the territory in force when this instrument was made contained the following sections :

Sec. 1. That mortgages upon real estate given to

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secure the payment of money, shall be foreclosed by petition in the district court of the county in which the real estate is situated, or of the county to which the county in which the real estate is situated is attached for judicial purposes.

Sec. 2. All deeds of real estate given to secure the payment of money shall be deemed mortgages within the meaning of this act, and shall be foreclosed in the same manner as mortgages on real estate are foreclosed.

Sec. 3. All proceedings to foreclose mortgages shall be conducted in conformity to the provisions of an act entitled "An act to establish a code of civil procedure," passed at the present session of the legislative assembly.

It is insisted on the part of the plaintiffs, that the power of sale contained in the deed of trust here in question was inoperative, because the statute cited forbade a sale under it. It is conceded that until the passage of the statute the equity of redemption might be cut off by the exercise of such power, and that since its passage a foreclosure can be effected only by a decree of the proper court. The contention is, that the provisions of the statute do not apply to mortgages or deeds of trust of personal property.

This construction is based upon the idea that, as the 1st section refers exclusively to mortgages of real estate and the manner of foreclosing them, and as the two succeeding sections have reference to the former one, they also are to be limited in their application to the same species of property. If the language of the statute, fairly construed, will support this view, the court will not be inclined to hold that the innova-

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tion introduced by the legislature was designed to extend further.

A close examination of the three sections of the act shows that the main purpose of the first was not to prohibit the foreclosure of mortgages according to their provisions, when they contained a power of sale, but merely to designate in what county the suit should be brought when judicial process was resorted to. If this section stood alone, I should think that this was its only purpose.

The 2d section has two purposes: first, to place deeds of trust on the same footing as mortgages, and secondly, to require that they should be foreclosed in the same manner as mortgages. The construction contended for by the plaintiffs requires us not only to disregard the word "all" as affecting its meaning, but to interpolate the words "real estate" after the words "deeds of trust;" so that, instead of reading, as it does, "All deeds of trust given to secure the payment of money," we shall read, "Deeds of trust upon real estate given to secure the payment of money." The difference is clear. When the legislature, which in the previous section had made a provision which, by its terms, was limited to real estate, drops the limiting words and makes a provision which includes all deeds of trust, it would be carrying judicial construction quite too far to say that by the latter phrase they meant no more than by the former.

But we are asked, inasmuch as the foreclosure of mortgages by the exercise of the power of sale contained in them is not prohibited by the 1st section, why deeds of trust may not be foreclosed by that process when the

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2d section provides that they shall be foreclosed in the same manner as mortgages of real estate. The answer is that the 3d section requires all mortgage foreclosures to be according to the code of civil procedure, that is by action and by judgment and sale.

Taking the act altogether, it seems reasonably clear that the intention of the legislature was to provide :

1. That mortgages of real estate should be foreclosed by proceedings in the district court of the county where the land was situated.

2. That all deeds of trust, whether of real or personal property, should, in respect of foreclosing the equity of redemption, be placed on the same footing as mortgages of real estate.

3. That all foreclosures, whether of mortgages or deeds of trust, and whether covering real or personal property, should be by proceedings in court under the code of civil procedure.

I regret that the courts of the state have not placed a construction upon this act. Had they done so I should gladly have followed their ruling.

The sale of the property of the Express Company to Holladay, without judicial proceedings under the authority of the power of sale contained in the deed of trust, violated the statute in force at the time when the instrument was made. It was therefore without authority, and in making it the trustees violated their trust. It follows that they and Holladay, the purchaser, are answerable for the proceeds of the property thus disposed of in the court of chancery, which has special jurisdiction of trusts. As the property has passed out

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of their hands and cannot be restored, they may be held to account for its value to the party entitled to it.

Who is this party? Obviously the Express Company. The wrong done by the unauthorized sale was suffered by it; although the legal title and right of possession was in the trustees, yet the equitable interest, the real ownership, was in the corporation. With it, and with it alone, an effective settlement could be made. It represents the creditors whose claims upon the fund to be recovered from Holladay and from the trustees are to be worked out through it. It represents the stockholders, including these plaintiffs, who seek relief here by reason of an injury inflicted upon it.

But this indispensable party is not before us. It is named in the bill as a defendant, but it has not been served with process nor appeared to the suit. I have before me now two subpoenas in chancery, issued at different times, both of which the marshal was directed to serve upon the company, but to each of them he returns that that defendant is not found in his district. It is not a party to, and cannot be affected by, the decree, whatever its terms, which we may render. Were we to-day to render a decree according to the prayer of the bill, or according to the modified relief now sought, it could to-morrow bring and maintain its bill against the same defendants, complaining of the same injuries, and seeking the same remedies; and yet our determination afford them no protection to the second inquiry into their conduct. It needs no words to explain that this cannot be. Holladay and the trustees have each a right to claim that the decree, if one be rendered against them,

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shall be in such terms and have such effect that it shall conclude all parties interested, and not leave them liable to be again called in question on account of the same matters.

There is good reason to believe, from certain testimony in the case, that the corporation might be served with process; and it is within the discretion of the court to order the cause to stand over in order that it may be brought in. There are, however, reasons why this course should not be pursued here.

1. This suit is brought by two stockholders on their own behalf, and on behalf of all others similarly situated who might come in and take part in the litigation. During the six years of the pendency of this bill, no other stockholder has come forward. The corporation is shown to be involved in debt. Holladay himself holds against it demands amounting to \$200,000, with which he is entitled to be credited upon the sum which may be recovered from him. The other debts exceed the value of the property which he wrongfully converted, and these must first be paid out of the fund to be recovered before anything could be distributed among the stockholders. The number of shares is 10,000, of which these plaintiffs only hold 381. They have not shown that they have paid the assessments even upon them. It is evident that their interest is merely nominal, that they have no pecuniary interest whatever.

2. The plaintiffs' conduct does not commend them to a court of equity. The trustees held possession of the property four months before the sale. During all this time the sale was advertised, and during a part of it one

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of the plaintiffs was a director in the company. Both of them knew that the possession of the property was in the trustees, that the business had been taken out of the hands of the officers of the company, and that the sale was impending. Payment to Holladay of what was due him, at any time during those four months, would have prevented the catastrophe which in effect extinguished not only its business, but its existence. And yet neither of the plaintiffs made any efforts, or called upon the directors to make any efforts, to save it by raising the money and tendering payment of what was due. To the present hour no effort to redeem has been made. By this course of conduct they have acquiesced in the proceedings taken by or on behalf of Holladay, and are concluded thereby. If a stockholder intends to treat an act of the corporation, or of its officers or agents, as illegal, he must insist upon his objections before the act is committed. He cannot stand by and see it done, and then hold the persons responsible who have been involved in it. *Hodges v. The New England Screw Co.*, 3 Rhode Island, 9; *Peabody v. Flint*, 6 Allen (Mass.), 52; *Graham v. The Binkenhead, &c., Railway Co.*, 12 Beavan, 460; 2 Mac. & G., 146; 2 H. & T. W., 450; 20 Law J. (N. S.), Ch., 445; 14 Jur., 494; *Hodgson v. The Earl of Powis*, 1 De G. Macn. & G., 6; 21 Law J. (N. S.), Ch., 17; 15 Jur., 1022; *Ffooks v. The London and South-Western Railway Co.*, 17 Jur., 365.

We thus see that these plaintiffs are without real pecuniary interest in the matter, and have acquiesced in the commission of the acts of which they now complain; and being in this situation, have stirred up a serious and

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bitter litigation, which the real party in interest declines when called upon to commence, or to participate in when commenced by others. They are not entitled to the favor of having the cause stand over in order to compel the appearance of the corporation.

3. Nor do they hold such a relation to the only relief which the court can give as to enable them to prosecute this suit as plaintiffs. This objection is fatal in any aspect which the case can be made to assume. The claim of a shareholder to come into a court of equity and ask that the rights of the corporation which it declines to assert be protected against injuries inflicted, or threatened by third parties, has received of late years much consideration. There is also some conflict of authority on the subject; but the supreme court of the United States, whose opinion is conclusive here, has gone as far as any other court in permitting shareholders to interfere in such matters, and if it has laid down principles which exclude these plaintiffs from the relief sought by them, it is useless to look further for authority on the subject.

The case of *Dodge v. Woolsey*, 18 Howard, 331, is, in some respects, analogous to the present, and is the sole authority relied on by the counsel for the plaintiffs to sustain their right to maintain this suit. In that case, the plaintiff was a stockholder in a bank incorporated and doing business in the State of Ohio. The defendant, Dodge, was about to collect by distress certain taxes, which were illegal, from the bank. The plaintiff requested the bank to take legal steps to prevent this, but it declined to do so. The supreme court held that he could maintain his suit against the collector for

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an injunction, making the bank also a party. In coming to this conclusion, the court examine fully the considerations on which the right of the plaintiff to maintain the suit rests, and cite numerous authorities on the question.

I think I am correct in stating that the propositions supposed by the court to be established by this examination may be stated thus :

1. That in case of an incorporated company with a capital stock divided into shares, and held by individuals, the corporation and the shareholders are distinct legal persons, and can sue and be sued by each other.

2. When the directors of a corporation have misapplied a portion of its funds to which a shareholder has a distinct right, as, for instance, a dividend, he may, in an action, recover the amount misapplied; and when such misapplication has not been effected, but is threatened, he may, by bill in equity for an injunction, prevent it.

3. When a corporation or its rights of property are threatened with an injury of such a nature as the court will enjoin, but it refuses to take any legal steps to protect itself, a stockholder may maintain a bill in equity against the party threatening the mischief and the corporation, to restrain by injunction the commission of the act, in order thereby to protect his interest from immediate damage.

But no case is cited, nor does any dictum in the opinion of the court go to the length of asserting, that when a corporation has been injured by a tort or a breach of a contract, or has any right of action, legal or equitable, against a party, an individual shareholder can

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come into court and prosecute that cause of action, because the corporation fails or refuses to do so. The court cites with approbation the following language from Angell and Ames on Corporations, § 393: "Although the result of the authorities clearly is, that a corporation, when acting within the scope of, and in obedience to, the provisions of its constitution, the will of the *majority*, duly expressed at a legally constituted meeting, must govern; yet beyond the limits of the act of incorporation, the will of the majority cannot make an act valid; and the powers of a court of equity may be put in motion, at the instance of a single shareholder, if he can show that the corporation are employing their statutory powers for the accomplishment of purposes not within the scope of their institution. Yet, it is to be observed, that there is an important distinction between this class of cases and those in which there is no breach of trust, but only error and misapprehension, or simple negligence on the part of the directors." And the court says that we have here the rule and its limitations. In the case before us, we have no attempt to transcend the powers of the corporation, nor any breach of trust on the part of the directors, but simply a neglect to bring a suit which one of the stockholders thinks should be brought.

Again, the court says, that the jurisdiction at the instance of a shareholder is to apply preventive remedies, by injunction, to restrain those who administer the affairs of the corporation from doing acts which would amount to a violation of the charter, &c. It also extends to inquiring concerning, and enjoining, as the case may require, individuals, in whatever character they may

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assume to act, from prosecuting any course of conduct which is in violation of a corporate franchise, or in denial of a right growing out of it, when, for the injury which will result, there is no adequate remedy at law. We see here, that where other parties are concerned, the jurisdiction is limited to cases in which preventive remedies are efficient for the protection of rights endangered by the neglect of the directors and the threatened aggressions of others. It would be a doctrine attended with very serious consequences if every individual shareholder, assuming the place of the corporation, could decide for it when actions should be brought to vindicate its supposed right. Each one of the shareholders might elect to claim a remedy, and resort to a tribunal different from those chosen by every other, and use the court of equity to enforce his views, regardless of its duly constituted officers and of all other parties having interests, rights, and powers equal to his own. In such a struggle, the real interests of the corporation might be entirely sacrificed. If such a doctrine should obtain, it would be dangerous to deal with a corporation, for whatever the understanding had with its lawful representatives, no one could be protected from the individual shareholders.

If a stockholder is aggrieved by the refusal of the board of directors to accept his views, his remedy is to unite with other stockholders and change those directors. But if irreparable mischief to his interests may ensue in the meantime, equity will administer preventive justice until such time as the will of the body of stockholders can be ascertained.

The Express Company not being a party to this pro-

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ceeding, will be at liberty to assert any claim it may think proper, growing out of these transactions, and is manifestly the proper party to do so, if it is to be done at all.

The plaintiff's bill is dismissed with costs.

Bill dismissed with costs.

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*LETTERS upon the subject of the Arrest in one District
of a Person accused of Crime committed in another
District.*

THE ARREST IN ONE DISTRICT AND REMOVAL OF PRISONER TO
ANOTHER FOR TRIAL.

A person arrested in one district, for an offence committed in another, who has not been indicted, nor committed by a commissioner, is entitled to an examination in the district in which he is arrested.

WHETHER THE POWER TO GRANT ORDER IS IN THE CIRCUIT JUDGE.

The power to order the removal of a person so accused from the district in which he is found to the one in which he should be tried, seems to rest in the district judge, and not in the circuit judge. So Mr Justice Miller intimates ; Mr District Judge Love *contra*.

A WARRANT issued by a commissioner in the northern district of Illinois for the arrest of Chauncey Bailey, for an offence committed in that district, was, with affidavits supporting the charge, submitted to Mr Justice Miller, with the request for an order to the marshal of the district of Iowa to make the arrest, in order that the accused might be removed to the district in Illinois for trial. The request was accompanied by the statement that it was recommended by Mr District Judge Drummond, as if he approved it and considered it proper to be granted. The same question having presented itself on a previous occasion to Mr District Judge Love, upon

a like application for the arrest of one Cook and one Tracy, similarly proceeded against, Mr Justice Miller applied to him for his views.

It may be proper here to state, that in what Judge Drummond had said in respect of the matter, he had not intended to be understood as approving the proceeding. He had not examined or considered the question, and the result reached by the learned judges, whose opinions are given herein, is believed to have met his approval.

In answer to Judge Miller's request, Judge Love gave his opinion in the following letter:

KEOKUK, August 30, 1869.

DEAR JUDGE,—I never before had a case presented to me exactly like the one referred to in the papers herewith returned. In each of the numerous instances in which application has been made to me for the removal of offenders, excepting that of Tracy and Cook, indictments had been found in the district where the offence was alleged to have been committed. When this application was made, the young gentleman who brought it said that Judge Drummond had told him the same as he seems to have told Messrs Vallette and Bearce; and further, that the universal practice was to have the preliminary examination in the district where the offence was committed. I, however, without giving any opinion upon the general question, held, as I had always done in cases of indictment, that the prisoner should be brought before me, in order that the fact of identity might be inquired into. In this, I proceeded upon the idea that the finding in the other district, whether by indictment or otherwise, established nothing with regard to the identity of the prisoner.

The marshal, in making the arrest, might mistake the man, and remove to a remote State an individual not charged with any offence whatever.

There were no affidavits accompanying Judge Drummond's order in this case, and when the prisoners were brought up,

the young man filed affidavits charging that the alleged offence was committed at the town of Brunswick in Scott county, Iowa. Upon this showing I discharged them, upon the ground that it would be futile to take the prisoners to a State where the court had no jurisdiction to punish the offence.

Upon looking closely at the law, I see nothing whatever to warrant Judge Drummond's view. I hardly suppose we could look behind an indictment; but I see no reason whatever, either in the words of the law or the reason of the thing, why, in a case where there has been no finding by a grand jury, or even by a commissioner, the prisoner should not be entitled to an examination before his removal to a distant State.

I find upon this subject, in Brightley's Digest, the following:

"Offenders committed to prison in a district other than that in which the offence is to be tried, may be removed to the latter for trial by a warrant of the judge of the district where they are imprisoned.

"The due course of law is that any individual, on an accusation against him, may be committed, if the offence be proved. The *circuit judge* may inquire whether the crime have been committed in the *United States or not*; and if committed within the United States, he is to commit him; and then the district judge is to remove him to the district where the crime was committed." 2 Burr's Trial, 451.

A distinction seems here to be taken between the power to commit and the power to remove for trial. The language of the law is, "It shall be the duty of the *judge of the district* to issue the warrant for the removal of the prisoner," &c. May not the circuit judge be regarded as a judge of the district, *quære*? As to many purposes, he certainly is, although that is not his title. In most respects, he is indeed the paramount judge of the district.—Yours very truly,

J. M. LOVE.

KNOX, *August 31, 1869.*

Messrs VALLETTE AND BEARCE.

GENTLEMEN,—Your favor of the 17th inst., inclosing an affidavit charging Chauncey Bailey with violation of the internal revenue law, at Napeerville, Illinois, together with Commissioner Haynes' warrant of arrest, directed to the marshal of the northern district of Illinois, is received, with your request that I would issue an order to the marshal of the district of Iowa, directing him to arrest said Bailey, and deliver him to the marshal of the northern district of Illinois.

I owe you an apology for the delay in responding to your letter. No statute was pointed out by you as authority for such proceedings, and the examination which I made hastily of the subject, resulted in a strong impression that there was none. With this, I should have been satisfied to return you the papers, but for the statement that Judge Drummond had suggested the application which you made to me.

My respect for Judge Drummond's opinion on a question like this, which it seems probable he has fully investigated in the course of his judicial experience, made me hesitate very much before settling down to an opposite conclusion. I therefore sent the papers to Judge Love, of this district, at Ottumwa, requesting his views upon the question. Owing to his absence from home, I did not receive his reply until yesterday. He expresses himself as entirely satisfied that a person arrested in one district for an offence committed in another, who has neither been indicted, nor had any preliminary examination, is entitled to have that examination in the district where he is arrested, and in this proposition I fully concur.

The 33d section of the Judiciary Act (1 U. S. Statutes at large, 91) enacts, "That for any crime or offence against the United States, the offender may, by any justice or judge of the United States, or by any justice of the peace, or other magistrate of any of the United States, where he may be found, agreeably to the usual mode of process against offenders in such State,

and at the expense of the United States, be arrested, and imprisoned or bailed, as the case may be, for trial before such court of the United States as by this act has cognizance of the offence. . . .

"And if such commitment of the offender or the witnesses shall be in a district other than that in which the offence is to be tried, it shall be the duty of the judge of that district where the delinquent is imprisoned, seasonably to issue, and of the marshal of the same district to execute, a warrant for the removal of the offender, and the witnesses, or either of them, as the case may be, to the district in which the trial is to be had."

The act of August 23, 1842 (5 U. S. Statutes at large, 516), which confers upon the commissioners of the United States, of whom Mr Haynes is one, the same authority that the act of 1789 conferred on the State magistrates, did not enlarge those powers, or provide for any different mode of exercising them. Nor do I know any act of Congress which has repealed or essentially modified the mode of proceedings pointed out by that act. The section, which I have quoted *verbatim* so far as it concerns the question before me, does not, in express terms, say that a person charged with an offence against the laws of the United States must have an examination in the district where he is arrested, though the offence be committed in another State. It does not, in so many words, say that he shall undergo any examination at all. The language is, that he may be arrested, and imprisoned, or bailed. But this is to be done according to the usual mode of process against such offenders in the State where he is arrested. It would be a waste of time to attempt to show that an imprisonment or order for bail is never made in any State without a previous examination into the probable guilt of the prisoner, unless he voluntarily waives such examination. Nor would any well-informed lawyer hesitate to hold that the act of Congress in question was not intended to authorize imprisonment without such preliminary examination by the committing magistrate as should satisfy him that there was enough evidence of the prisoner's guilt to justify a reference of the case to the grand jury of the proper district.

Where, then, is the preliminary examination to be had ?

The most careless reading of the provisions of the act can leave no doubt on that subject.

For any crime against the United States, the offender may be imprisoned, or held to bail, after, as I have shown, an examination by the proper officer of the State or district where he may be found.

If this language left any doubt on the subject, it would be removed by a subsequent provision in the same section, that, if the commitment takes place in a district other than that in which the offence is to be tried, the judge of the district where the delinquent is imprisoned shall make the necessary order for his removal to the proper district for trial. This so clearly contemplates an examination and imprisonment in the district where the offender is found, without regard to that in which the offence was committed, that comment could not make it plainer.

The power to order removal in these cases seems to rest alone on the judge of the district court. Such is the language of this act ; and, in the absence of any statute authority, I should doubt very much the right of a judge of any other court to make such an order ; though, possibly, the words "judge of the district" may, by a liberal construction, be held to include any judge who exercises jurisdiction within the district. See, however, 2 Burr's Trial, 451.

I am therefore of opinion that no authority exists in any judge to order the removal of Mr Bailey into the district of Illinois, until he shall have had a hearing, or been committed to prison in Iowa by some proper officer.

I therefore return you the papers, and am, your obedient servant,

SAMUEL F. MILLER.



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2. <i>No Act of Disloyalty necessary</i> .—In the rebellion, one resident in the "Confederacy," and subject to its control, is a public enemy, although he may have committed no act of disloyalty,	ib.
VI. EFFECT OF PROCLAMATION ON STATUS OF LOYAL RESIDENTS OF THE "CONFEDERACY."	
1. <i>Cannot change the Rule</i> .—No proclamation can change or modify this rule, and it is doubtful if it can relieve a party from the disabilities which it imposes,	104
2. <i>Its Design</i> .—The President, by his amnesty proclamation, did not intend to place parties who should avail themselves of it in any better position than those who, residing in the insurrectionary districts, had always maintained their allegiance to the Federal Government,	ib.
3. <i>Such Persons need no Pardon</i> .—When the war ceases, all their rights are at once restored, and their disabilities are removed,	ib.
4. <i>Whether Action sustainable, quære?</i> —Whether a public enemy can sustain an action in our courts	

for a trespass committed in his country in time of war, <i>quare</i> ?	Page 104
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ALLUVION.—See PRE-EMPTION, 2.

AMBIGUOUS LANGUAGE.—See EVIDENCE, 8.

AMENDMENT.—See ADMINISTRATOR, 3 ; PLEADING, 7, 9.

AMNESTY PROCLAMATION.—See ALIEN ENEMY, 4, 7, 8.

ANSWER.—See BANKRUPTCY, 1, 2 ; EVIDENCE, 9.

APPEAL.—See ERROR.

ARRESTING DESERTERS—

I. WHEN OFFICER WITHIN PROTECTION OF ACT OF FEBRUARY 24,
1864 (13 *U. S. Statutes at large*, 6).

1. *Seeking Assistance*.—Parties employed by proper officers to arrest deserters, when, having come into a vicinage on such service, they are returning therefrom to another place to obtain assistance to effectually discharge their duty, are employed in arresting deserters within the meaning of the act of February 24, 1864. *United States v. Gleason*, . 128
2. *When not making Arrest*.—It is not necessary that such parties be at the time in the immediate act of making the arrest, *ib.*
3. *Purpose of Act*.—The purpose of the act is to protect the life of the person so engaged, and this protection continues so long as he is employed in a service necessary and proper to the discharge of his duty in that behalf, *ib.*
4. *No Judicial Discretion*.—Parties charged by the proper officers with the duty of arresting persons especially named as deserters, cannot make their obedience to their orders dependent upon any inquiry on their part whether the persons to be arrested be in fact deserters or not, *ib.*
5. *Not Dependent upon Guilt*.—The protection which the law affords to parties executing it does not depend upon the legal guilt of the persons charged as deserters, *ib.*

II. WHEN PARTY IS GUILTY UNDER THE ACT.

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1. *Officers off Duty*.—If a person assault parties charged with this service when they are not engaged therein, he is not amenable to the Federal laws, however malicious the deed may be, and even though it result in death, 129
2. *Motive*.—In order to the guilt, under this act, of the person making the assault, he must be moved thereto by some motive having relation to the service in which the party assaulted was engaged, *ib.*
3. *Casual Rencontre*.—It is not enough that the offence was committed in a casual rencontre which would have occurred if the person assaulted had not been engaged in that service, *ib.*
4. *Aiding and Abetting*.—It is not necessary that the accused should have personally made the assault. It is enough if, with the spirit above mentioned, he brought or aided in bringing it about, *ib.*

ASSAULT.—See CRIMINAL LAW, 1, 2, 3; ARRESTING DE-SERTERS, 6, 7, 8, 9.

ASSESSOR.—See TAXES, 3 (2).

ASSIGNEE.—See BANKRUPTCY, 6, 7.

ATTACHMENT.—See MANDAMUS, 4; PRACTICE, 1.

ATTORNEY.—See CONTEMPT, 5; COSTS, 2.

BANKRUPTCY—

I. ISSUE IN INVOLUNTARY BANKRUPTCY,—HOW JOINED, AND HOW TRIED.

1. *Answer to Rule*.—It is doubtful if any answer be necessary in proceedings in involuntary bankruptcy to a rule upon a debtor to show cause why he should not be declared a bankrupt. *Phelps v. Clasen*, 204
2. *Proper Response*.—A paper simply denying the acts of bankruptcy charged, and demanding a trial by jury, is a proper response on the part of a debtor to such rule, *ib.*

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3. <i>Proof of Debt</i> .—On such trial, the petitioning creditor, it seems, need not make proof of his debt, . . .	204
4. <i>By whom Petition filed</i> .—The petition in involuntary bankruptcy may be filed by any creditor whose debt is provable under the act, . . .	ib.
5. <i>What provable</i> .—Any debt existing at the time of the adjudication, although not then due and payable, is provable under the act, . . .	ib.
II. STATUS OF ASSIGNEE IN BANKRUPTCY.	
1. <i>May maintain Action for Possession</i> .—Under the 14th section of the Bankrupt Act, the assignee becomes vested with the title, and entitled to the possession of the property of the bankrupt, and he may maintain an action for its recovery in a court of justice. <i>Johnson, Assignee, v. Bishop, Sheriff</i> , . . .	324
2. <i>But not against State Sheriff</i> .—But such action cannot be maintained, in a Federal court, to take such property from a State sheriff, who has taken it upon attachment duly issued to him out of a State court before the proceedings in bankruptcy were commenced, . . .	ib.
(1.) <i>Argu.</i> —The sheriff's possession is that of the court of which he is an officer: no other court will interfere therewith as long as the proceedings are pending, . . .	ib.
(2.) <i>Argu.</i> —Whether or not the State court has been ousted of its jurisdiction by the proceedings in bankruptcy, depends upon two questions of fact: one, whether the debtor has been adjudicated a bankrupt; and the other, whether he is the only member of the firm. Of the action of the Federal court on these matters, the State court is not bound to take judicial notice, . . .	ib.
(3.) <i>Argu.</i> —The Federal courts have not exclusive jurisdiction of actions in behalf of assignees in bankruptcy. If their rights are not regarded in the State courts, their remedy is under the 25th section of the Judiciary Act, . . .	ib.
See CIRCUIT COURT, 1, 2, 3; ERROR, 4; JURISDICTION, 13.	

BELLIGERENCY.—See ALIEN ENEMY.

BILL OF EXCEPTIONS.—See ERROR, 5, 6.

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BOARD OF OFFICERS—

I. STATUTORY POWERS.

1. *Strictly pursued*.—Proceedings *in pais* for the purpose of divesting one person of the title to real estate and conferring it on another, must be shown to be in exact pursuance of the statute authorizing them, and no presumption will be indulged in their favor. *Schenck v. Peay and Bliss*, . . . 176
2. *All must act*.—Where authority of this kind is conferred on three or more persons, in order to the validity of its exercise, all must participate, or have an opportunity of participating, in the proceedings, . . . 177
3. *Action of two out of three*.—The action of two out of three commissioners, to all of whom a power is confided, cannot be upheld when the third took no part in, and knew nothing of the transaction, and had no opportunity to exert his legitimate influence in determining the course to be pursued, *ib.*
4. *No Board*.—A statute provided a board of three tax commissioners to assess taxes on real estate, and, in case of their non-payment, to sell and deliver possession of the property to the purchaser. Three commissioners were appointed, but only two acted or qualified. *Held*, there was no board of commissioners ever in existence, the two without the third not constituting a board. The intention of Congress in requiring three was that no less number should act, . . . *ib.*

See RETROACTIVE STATUTES, 3, 4, 5.

BONA FIDE PURCHASERS.—See PRE-EMPTION, 12.

BOUNDARY.—See PRE-EMPTION, 1, 2, 3.

BRIDGE.—See CONSTITUTIONAL LAW, 5, 6, 7; STATUTES, 1, 2, 3.

BUILDING CONTRACTS.—See SPECIFIC PERFORMANCE, 6, 7, 8.

BYE-LAW.—See CORPORATION, 4, 5.

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CAPTURES.—See ADMIRALTY, 8, 9, 10, 12, 13, 14, 15, 16, 17.

CHANCERY.—See EQUITY.

CHANGE OF RESIDENCE.—See REMOVAL OF CAUSES, 11, 12, 13.

CIRCUIT COURT—

I. JURISDICTION IN BANKRUPTCY.

1. The second section of the Bankrupt Act confers on the circuit court complete and unlimited control over proceedings in bankruptcy, including the whole case, so that it may be removed from the district court, and also any separate branch of it, or any particular question arising in it. *Ruddick, Plaintiff in error, v. Billings*, 331
2. *Process*.—And it may assume and exercise this jurisdiction by bill, petition, writ of error, writ of *certiorari*, or other appropriate process, *ib.*
3. *Petition*.—It would seem that the proper process by which to remove from the district to the circuit court an order granting or refusing a discharge, is by petition under the 2d section of the act, *ib.*
See ERROR, 3.

CIRCUIT JUDGE.—See PRACTICE, 6.

CITIZENSHIP.—See ALIEN ENEMY, 5 ; REMOVAL OF CAUSES, 5, 8, (1), 11, 12, 13.

CITY.—See CORPORATION, 1, 2.

CIVIL ACTION.—See WITNESS, 1.

CLERK OF COURT.—See COSTS, 1.

COLLECTION.—See TAXES.

COLOR OF TITLE.—See ADVERSE POSSESSION

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- COMMERCE.—See ADMIRALTY, 19, (1); CONSTITUTIONAL
LAW, 5, 6; DOMESTIC COMMERCE, 1, 2.
- COMMISSIONERS.—See BOARD OF OFFICERS, 2, 3, 4; TAXES.
- COMMON CARRIERS—
- I. COMMON CARRIER OF PASSENGERS' BAGGAGE AND GOLD.
1. The case of the *Orange County Bank v. Brown*,
9 Wend., 116, distinguished. *Hellman v. Holladay*, 365
 2. If a passenger surreptitiously introduce into a coach
an article of great value, with the view of getting
it carried for nothing, when the carrier is accus-
tomed to charge for such services, he is guilty of a
gross fraud, and in case of loss cannot recover, . . . *ib.*
 3. But if, notwithstanding the passenger's intention to
defraud him, the carrier learns the fact, and, know-
ing it, charges, and the passenger pays, for carry-
ing the article as extra baggage, and for charges
usual therefor, then the carrier is liable for the
value of the article in case of its loss, . . . *ib.*
 4. It is for the jury to say, from the whole evidence,
whether the carrier received the compensation
knowing the baggage to contain gold, . . . 366
- COMPETITION.—See LAND SALES.
- CONFISCATION ACT.—See ERROR, 1, 2; PLEADING, 2.
- CONGRESSIONAL AUTHORITY.—See ADMIRALTY, 19, (2);
CONSTITUTIONAL LAW; JURISDICTION, 1; RETROACTIVE
STATUTES, 1.
- CONSIDERATION.—See EVIDENCE, 5.
- CONSOLIDATION OF WRITS.—See COSTS, 2, (1), (2);
MANDAMUS, 5.
- CONSTITUTIONAL LAW—
- I. CONSTITUTIONALITY OF ACT OF MARCH 2, 1867.
1. *Intention*.—The Act of March 2, 1867 (14 U. &
Statutes at large, 432), was intended :
(1.) To validate punishment of offenders which would
otherwise be invalid. *In re petition of William*
Murphy, 141

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(2.) To protect from civil process persons who, under the President's orders, in striving to suppress the rebellion, had rendered themselves amenable to prosecutions,	141
2. The provision to secure the first of these objects is unconstitutional, because it is <i>ex post facto</i> ,	<i>ib.</i>
3. <i>Relation to Presentment by Grand Jury</i> .—This act will not prevent the discharge of a prisoner held by sentence of a military commission, if the grand jury, organized next after a list of prisoners so held is furnished to the judges, do not present him to the court for trial,	<i>ib.</i>
4. <i>Civil Rights</i> .—So far as that act relates to civil rights, and affords protection against civil suits, it was within the competency of Congress. <i>Per Mr Justice Miller</i> ,	142
II. ACT OF FEBRUARY 27, 1867, CONSTITUTIONAL.	
1. <i>Effect of Treaties</i> .—A law declaring lawful a bridge over the Mississippi river, which obstructs the navigation, is not unconstitutional because of the treaty with France, by which its free navigation is secured. <i>The Clinton Bridge</i> ,	150
(1.) <i>Argu.</i> —Such questions are international and political in their character, and belong to the executive and legislative departments of the government,	<i>ib.</i>
2. <i>The Commercial Clause</i> .—A law authorizing such a bridge to be built, and prescribing general rules for its construction and maintenance, is a regulation of commerce, and it is within the powers conferred on Congress by the commercial clause of the constitution,	<i>ib.</i>
(1.) <i>Argu.</i> —It was so held in the <i>Wheeling Bridge case</i> , 18 Howard, 421,	151
(2.) <i>Argu.</i> —Any means by which passengers and merchandise are transported is an element of commerce,	<i>ib.</i>
(1.) This has been repeatedly held in respect of navigation, and Congress has legislated on the subject accordingly,	<i>ib.</i>
(2.) The railroad, as much as the steamboat, is a means of interchanging persons and property, which interchange is commerce itself,	<i>ib.</i>

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| (3.) <i>Argu.</i> —When railroads become portions of the great highways of our Union, acting an important part in a commerce which embraces many States, to regulate them is to regulate commerce, | 151 |
| (4.) <i>Argu.</i> —This is true of a bridge over a great river for the passage of such railroad, | ib. |
| 3. <i>Interference with Jurisdiction.</i> —The act is decisive of the case, not because it deprives the court of jurisdiction, but because it furnishes a rule by which the action of the court is determined, | ib. |
| See GOVERNMENT LANDS ; JURISDICTION, 1, 11 ; REMOVAL OF CAUSES, 9, 10 ; RETROACTIVE STATUTES, 1 ; TAXES, 4. | |

CONSTRUCTION.—See CONTRACT, 2 ; RETROACTIVE STATUTES, 2, 3, 4, 5 ; STATUTES AND HEADS THERE REFERRED TO.

CONTEMPT—

I. PROCEEDINGS TO PUNISH CONTEMPT.

1. *By Motion to Commit.*—The proper practice to punish for contempt in violating an injunction is by motion to commit, upon proper notice to the parties proceeded against. *Gray v. Chicago, Iowa, and Nebraska Railroad Company* 63
2. *Notice necessary.*—The rule requiring notice is salutary, and will not be relaxed by this court, ib.
3. *Order granted without Notice.*—An order of arrest issued without such notice will be discharged on motion, ib.

II. CHARACTER OF PROCEEDINGS.

1. *Criminal.*—Prosecutions for contempt of court are criminal in their character, the United States being plaintiff (32), 377
 2. *District Attorney.*—Whenever the vindication of the authority of government requires it, the district attorney should appear in such proceedings, ib.
- See MANDAMUS, 4.

CONTRACT—

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I. OF BECOMING PARTIES TO WRITTEN CONTRACT.

1. Persons who signed a paper reciting a contract between them, naming them as the contracting parties, and referring to their intentions in separate clauses, are bound by the obligations thereby imposed, and are entitled to the rights thereby conferred, whether they understood themselves as signing as witnesses or as parties. *Phelps v. Clasen*, 204
2. *Statement and Holding*.—A partner selling his interest in the firm property to his co-partner and a third party, gave a writing containing the following clause: "And it is further understood by the parties of the second part (*i.e.*, the vendees), that the above sale is made subject to any indebtedness made by the purchase of any of the before mentioned goods, wares, and merchandise, by Jennings & Phelps, and Phelps & Clasen, for which reference is made to an account of liability of the 1st day of April, 1867." *Held*, that as the clause did not import a promise on the part of the vendees to pay those debts, proof of extrinsic facts was admissible on the point,—*viz.*, whether or not there were liens on the property, and what was the value of the property; and that the clause means that the vendees take the goods charged by this contract with a liability to pay, out of their proceeds, the debts mentioned, 205
 See ADMIRALTY, 4, 6; AGENCY; ALIEN ENEMY, 3; CORPORATION, 1, 2; EVIDENCE, 5, 6, 7, 8; INSURANCE; LAND SALES; LEX LOCI; PRE-EMPTION; SPECIFIC PERFORMANCE; WAREHOUSE RECEIPTS.

CORPORATION—

I. CITY PURCHASING LAND FOR CORPORATE PURPOSES.

1. *Rule at Common Law*.—At the common law, a municipal corporation can take and hold the title to such lands as its necessities require; nor can it take the title in another's name in trust for itself. *Root v. Shields*, 340

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2. <i>Modified by Statute</i> .—This rule is changed in Nebraska by statute,	340
3. <i>Title of Trustee</i> .—The objection at the common law would avoid the trust, and leave the title in the trustee discharged of all duty to the corporation, and subject to be disposed of by him, if he held by a deed absolute on its face, and paid the consideration, and the trust were evidenced only by agreement between him and the corporation,	341
II. EFFECT OF A BYE-LAW OF DIRECTORS OF A CORPORATION.	
1. <i>As to Third Parties</i> .—A bye-law adopted by a board of directors of a corporation, providing how special meetings of the board shall be called, does not affect third parties dealing with the corporation. <i>Samuel v. Holladay</i> ,	400
2. <i>Ratification</i> .—Proceedings of the board of directors of a corporation, at a special meeting not called in the manner prescribed by the bye-law, may be subsequently ratified by the corporation,	ib.
III. A CORPORATION IS A NECESSARY PARTY TO A SUIT TOUCHING THE CORPORATE PROPERTY.	
1. A corporation which has conveyed its property in trust to secure a debt, retains the real ownership, although the legal title and right of possession is in the trustee. It is a necessary party to a suit to vindicate its rights in respect of such property as against a wrong-doer,	401
2. No decree will be rendered against a wrong-doer which will leave him exposed to a subsequent suit for the same matter,	ib.
3. The corporation is the only party which can settle a matter touching the corporate property. Through it the interests of its creditors must be worked out. It also represents the shareholders, who are entitled only to the assets remaining after the payment of its debts,	ib.
IV. OF STOCKHOLDERS SUING TO PROTECT THE CORPORATE PROPERTY.	
1. <i>When their Interest is Small</i> .—A suit brought by two shareholders on behalf of all similarly situated who may come in to prosecute, which has been pending six years without any other shareholder	

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coming forward, when their interests are trifling compared with the whole number, will not be directed to stand over to add parties,	401
2. <i>A Case not entitled to Favor.</i> —A bill is not entitled to the favorable consideration of the court which is filed and prosecuted by stockholders who do not show affirmatively that they have paid for their stock, in order, without the concurrence of the company, to recover corporate property which has been sold after a notice of four months, during which time neither they, nor the directors, nor the company, endeavored to pay the debt on account of which the sale was made, or otherwise prevent its taking place,	<i>ib.</i>
V. <i>DODGE v. WOOLSEY</i> , 18 HOWARD, 331, CONSIDERED.	
1. <i>The following Propositions established by this Case :</i>	
(1.) In the case of an incorporated company with capital stock divided into shares which are held by individuals, the corporation and the shareholders are distinct legal persons, and can sue and be sued by each other,	<i>ib.</i>
(2.) When the directors of such corporation have misapplied a portion of its funds to which a shareholder has a distinct right— <i>e.g.</i> , a dividend—he may recover the amount so misapplied ; and if this has not been effected, but only threatened, he may enjoin it,	<i>ib.</i>
(3.) When a corporation or its rights of property are threatened with an injury such as a court of equity will enjoin, but refuses to take legal steps to protect its rights, a stockholder may maintain a bill against the party threatening the mischief, and the corporation, to restrain the commission of the act, in order to protect his interest from immediate damage,	403
(4.) No <i>dictum</i> , in this opinion, goes the length of asserting that when a corporation has a cause of action against a party, an individual stockholder may prosecute it simply because the corporation refuses to do so,	<i>ib.</i>
See INCORPORATION, 1 ; LEX LOCI, 1 ;	
PRE-EMPTION, 7, 8, 9, 10, 11.	

COSTS—

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I. WHEN SEVERAL WRITS ARE ISSUED.

1. *Marshal and Clerk*.—When a separate writ for attaching each member of a board of officers has been issued, the marshal and clerk will be allowed their costs in each case (32), 377
2. *District Attorney*.—The district attorney is entitled to but one fee for all the cases arising out of one writ of mandamus, *ib.*
 - (1.) *Argu*.—The statute provides that he shall have but one bill of costs in several proceedings which should be joined, *ib.*
 - (2.) *Argu*.—He should know when they should be joined, and, if they are not joined at the outset, he should move for their consolidation. If he fails to do so, he can have nothing, by reason of his neglect of duty, *ib.*
See AGENCY, 3.

COUNTY ASSESSOR AND COUNTY TREASURER.—

See TAXES, 3, (1), (2).

COUPONS—

I. COUPONS NO PART OF PRINCIPAL DEBT.

1. Coupons attached to bonds, providing for the yearly interest on the sum named in the bond, do not form part of the principal debt, 69
2. The five per centum valuation, mentioned in section 3, article xi., of the Iowa Constitution, does not include such coupons. *Durant v. Iowa County*, *ib.*
See LIS PENDENS, (1), (2), (3).

COURT OF CLAIMS.—See PRACTICE, 4.

CRIMINAL LAW—

I. KILLING OF ENROLLING OFFICER UNDER ACT OF FEBRUARY 24, 1864 (13 U. S. Statutes at large, 8).

1. *When Murder within the Act*.—If an officer, while engaged in the proper discharge of his official duties, have occasion to deal with a man who, under the influence either of a general hostility to the law, or of a violent temper which is roused by no fault of the officer, or of a spirit of revenge, makes an assault which results in the death of the officer, a purpose in his mind to obstruct the

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execution of the law is not necessary to constitute the offence a crime under the act. <i>United States v. Gleason</i> ,	75
2. <i>When not</i> .—But, on the other hand, if the officer should be employed in the discharge of such of his duties as did not bring him in collision with others, as when going through the country serving notices of a draft, and should become involved in a quarrel upon some matter having no connection with his official duties, but growing out of some personal difficulty of his own, and should be assaulted and killed, the author of the homicide would not be amenable to this act,	<i>ib.</i>
(1.) <i>Argu.</i> —The object of this law was to prevent obstruction to its execution,	<i>ib.</i>
(2.) <i>Argu.</i> —If it seek to draw to the Federal jurisdiction offences against the person of a Federal officer, simply on the ground that he is such officer, the act may be unconstitutional,	<i>ib.</i>
 II. INDICTMENT UNDER THE ACT.	
1. <i>Must contain Averment of Animus</i> .—As it must be shown in proof that the <i>animus</i> of the assault was roused by the officer's discharge of his duties, the indictment must contain an averment to that effect,	<i>ib.</i>
 III. EXEMPTION OF DRAFTED PERSON BY FRAUD.	
1. <i>Period of Imprisonment</i> .—The act of February 24, 1864 (13 U. S. Statutes at large, 10), assumes to fix a definite period of imprisonment as a punishment for the offence of procuring by fraud the exemption of a drafted person, and leaves to the court no discretion in that regard. <i>United States v. McCarty</i> ,	93
2. <i>How limited</i> .—The period of punishment is therein fixed as the same as the period for which the party drafted had to serve ; which, as provided by section 11 of the act of March 3, 1863 (12 U. S. Statutes at large, 733), is to the end of the rebellion, but not more than three years,	<i>ib.</i>
 IV. THE PERIOD OF IMPRISONMENT.	
1. <i>Three years</i> .—The offender may not be imprisoned three years, for the rebellion may not continue so long,	<i>ib.</i>

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| <p>2. <i>During the Rebellion</i>.—He cannot be sentenced to confinement during the rebellion, for shortly after he is condemned the rebellion may terminate, and then the court could not inquire into the matter,
 See ARRESTING DESERTERS ; CONTEMPT, 4, 5 ;
 EVIDENCE, 1, 2, 3, 4 ; JURISDICTION, 1, 2,
 3, 4, 5, 7, 8, 9, 10, 11, 12.</p> <p>CROSS BILL.—See PLEADING, 5, 6.</p> <p>CUSTOM.—See ADMIRALTY, 2, (3).</p> <p>DAMAGE.—See INSURANCE, 1.</p> <p>DEED.—See ADVERSE POSSESSION ; CORPORATION, 3.</p> <p>DETINUE.—See PLEADING, 1.</p> <p>DIRECT TAX.—See REMOVAL OF CAUSES, 2, 3.</p> <p>DISCHARGE.—See CIRCUIT COURT, 3 ; RECEIVER, 1, 2, 3, 4, 5.</p> <p>DISCRETION. — See ARRESTING DESERTERS, 4 ; LAND OFFICERS, 3 ; TAXES, 3.</p> <p>DISMISSAL OF WRIT.—See ERROR, 7.</p> <p>DISTRICT COURT.—See CIRCUIT COURT, 1, 2, 3 ; ERROR.</p> <p>DISTRICT ATTORNEY.—See CONTEMPT, 5 ; COSTS, 2.</p> <p>DISTRICT JUDGE.—See INJUNCTIONS, 4 ; PRACTICE, 6.</p> <p>DOMESTIC COMMERCE—</p> <p>1. <i>Not under National control</i>.—There is a commerce strictly internal to each State, over which Congress has no control, although it may be carried on by means of the navigable rivers of the United States ; and Congress, in its legislation, has kept this steadily in view. <i>The "Bright Star,"</i> . . .</p> <p>2. <i>Instance</i>.—A steamboat was engaged in carrying passengers from one small town to others on a navigable river, all within one State. At times she</p> | <p>Page</p> <p>93</p> <p>266</p> |
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carried between the same towns merchandise that was purchased in other and distant States, and, by usual and great routes of travel, brought to one place, whence it was shipped to the place where she received it: <i>Held</i> , She was not engaged in inter-state commerce; and her character would not have been changed had the merchandise which she carried been shipped from the place of purchase to the place of final destination in one continuous voyage,	266
See ADMIRALTY, 19, (1); CONSTITUTIONAL LAW, 5, 6; FERRY-BOAT.	
DOUBLE SERVICE.—See ADMIRALTY, 3.	
DRAFTED PERSONS.—See CRIMINAL LAW, 4, 5, 6, 7.	
DYING DECLARATIONS.—See EVIDENCE, 1.	
ENDORSEMENT.—See WAREHOUSE RECEIPTS, 2.	
ENFORCEMENT OF CONTRACT.—See SPECIFIC PERFORMANCE.	
ENROLLING OFFICER.—See CRIMINAL LAW, 1, 2, 3.	
ENTRY.—See PRE-EMPTION, 3, 6, 7, 10.	
EQUITY.—See ERROR; INJUNCTION; MANDAMUS; PARTIES; PLEADING, 7, 8, 9; PRACTICE, 1, 2, 3; RECEIVER; SPECIFIC PERFORMANCE.	
EQUIVOCAL WORDS.—See INSURANCE, 5.	
ERROR, WRIT OF—	
I. MODE OF CARRYING CONFISCATION CAUSES TO REVISORY COURT.	
1. <i>By Writ of Error</i> .—The supreme court in “Armstrong’s Foundry” (6 Wallace, 766), has held that confiscation causes are not admiralty cases, although the proceedings therein are by statute assimilated to the admiralty practice. They are, like other	

seizures on land, common law cases, and are to be removed into revisory courts by writs of error.	Page
<i>Brown v. United States</i> ,	198
2. <i>Not by Appeal</i> .—Appeal in such a case dismissed, .	<i>ib.</i>
II. REMOVING CAUSES IN BANKRUPTCY INTO CIRCUIT COURT.	
1. <i>Error and Appeal</i> .—Actions at law are removed for review from an inferior to a superior court of the United States by writ of error; and suits in chancery by appeal. <i>Ruddick v. Billings</i> , .	330
2. <i>In Bankruptcy</i> .—This distinction is, by the 8th section of the Bankrupt Act, preserved, .	<i>ib.</i>
3. <i>Questions of Law</i> .—On a writ of error, no question of fact can be re-examined;—only questions of law are subject to review,	<i>ib.</i>
4. <i>Exceptions taken</i> .—Consequently, a bill of exceptions embodying the testimony taken in support of, and resistance to, an application for a bankrupt's discharge, which shows no question of law raised or decided on the trial, and an exception only to the final order granting the discharge, does not present a case for review on writ of error,	<i>ib.</i>
5. <i>Writ Dismissed</i> .—To the general rule that the writ of error will be entertained, and the judgment affirmed, unless the record shows some error of which the revisory court can take cognizance, there are exceptions. In such exceptional cases, the writ will be dismissed without prejudice to another writ, or to an effectual process to remove the cause,	331

ESTOPPEL.—See INCORPORATION, 1; PARDON, 1; WAREHOUSE RECEIPTS, 3.

EVIDENCE—

I. DYING STATEMENTS OF PERSONS KILLED.

1. *How Weighed*.—The character of the statements, *in extremis*, of a person who has been killed, their consistency with established facts, and all the circumstances of the dying man, are to be considered by the jury in determining the weight to which his account of the transaction is entitled. *United States v. Gleason*,

II. STATEMENTS OF ACCUSED.

Page

1. If a person, knowing himself to be suspected of a crime, makes contradictory statements with reference to it, the fact has not the effect, as in the case of an ordinary witness, of neutralizing his testimony, 129
2. *Presumption*.—It is reasonable to assume that if such person withholds the truth, he does so because it is unfavourable to his innocence, *ib.*
3. *Contradictory Statements*.—The effect of statements made by a party against his interest cannot be avoided by contradictory statements, *ib.*

III. PAROL PROOF TO EXPLAIN WRITTEN AGREEMENT.

1. *Of Consideration*.—Parol proof may be received of the consideration of an instrument different from the one recited in it, as well when it is signed by both parties, as when it is signed by only one. *Phelps v. Clasen*, 205
2. *When Meaning is Clear*.—Parol proof is inadmissible to contradict or vary the terms of a written instrument in which the parties have expressed a clear meaning, *ib.*
3. *When it is unintelligible*.—Nor is parol evidence admissible to show what the meaning of the parties was when the terms of the instrument, in the light of all the circumstances, remains unintelligible, *ib.*
4. *When Ambiguous*.—But when the instrument does not suggest what the meaning of the parties was, and when the language is susceptible of more than one meaning, and it is uncertain which is the proper construction, parol testimony is admissible of all the circumstances, showing the relation of the parties, their knowledge of the subject-matter of the contract, and the state or condition thereof, and of all other facts which shed any light on their intention or meaning, *ib.*

IV. ANSWER AS EVIDENCE.

1. Circumstances tending to establish a fact, held to be insufficient to countervail the positive denial in the answer. *Root v. Shields*, 341
 See BANKRUPTCY, 3, 4, 5 ; CONTRACT, 1, 2 ;
 PRE-EMPTION, 5 ; REASONABLE DOUBT ;
 WAREHOUSE RECEIPTS, 3 ; WITNESS.

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- EXAMINATION OF ACCUSED PERSON.—See PRACTICE, 5.
- EXCEPTIONS, BILL OF.—See ERROR, 6.
- EXECUTORY CONTRACT.—See SPECIFIC PERFORMANCE, 5.
- EXECUTOR.—See ADMINISTRATOR.
- EXEMPTION.—See CRIMINAL LAW, 4, 5, 6, 7.
- FEDERAL AND STATE JURISDICTION.—See JURISDICTION.
- FERRY-BOAT—
- I. WHEN NOT EXCLUSIVELY ENGAGED IN FERRYING.
1. A steamboat, licensed by State authority as a ferry-boat to run across the Missouri river, between towns on each of its banks both within one State, but frequently employed in voyages beyond her ferry limits to distant towns, is not exclusively engaged in ferrying. *The "Bright Star,"* . . . 266
- II. INSPECTION.
1. *Exemption.*—The simple allegation that such boat is a ferry-boat, does not show that it is not subject to inspection under the act of August 30, 1852 (10 U. S. Statutes at large, 61), . . . *ib.*
2. *When subject to.*—The act of June 8, 1864 (13 U. S. Statutes at large, 120), subjects to inspection, under that act, ferry-boats engaged in foreign and interstate commerce, . . . *ib.*
3. *Not extended by Act of July 25, 1866.*—This act does not extend the requirement of the act of 1852 concerning the inspection of hulls, &c., to vessels engaged in commerce wholly within a State, . . . *ib.*
See DOMESTIC COMMERCE, 1, 2.
- FORECLOSURE.—See AGENCY, I., 1, 2, 3; MORTGAGE.
- FOREIGN ADMINISTRATOR.—See ADMINISTRATOR.
- FOREIGN VESSELS.—See ADMIRALTY, 20.

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- FORFEITURE.—See TRADE REGULATIONS.
- FRAUD.—See CRIMINAL LAW, 4, 5, 6, 7.
- GOLD COIN.—See TRADE REGULATIONS.
- GOVERNMENT BONDS.—See SPECIFIC PERFORMANCE, 1, 3.
- GOVERNMENT LANDS—
- I. ESTABLISHMENT OF FORT.
1. *Consent of State*.—Whether the constitution requires the consent of the State in which it is located, as a condition precedent to the establishment upon, and use as a fort of, a place already belonging to the United States, may be doubted. *The United States v. Stahl*, 192
 See JURISDICTION, 7, 8, 9, 10, 11, 12; PRE-EMPTION.
- HOMICIDE.—See ARRESTING DESERTERS, 6, 7, 8, 9; CRIMINAL LAW, 1, 2, 3.
- IMPLICATION.—See REPEAL BY RETROACTIVE STATUTES, 2.
- IMPRISONMENT.—See CRIMINAL LAW, 4, 5, 6, 7.
- INCHOATE RIGHT.—See PRE-EMPTION, 4.
- INCORPORATION—
1. *Validity not to be Questioned*.—When a party has been impleaded in a bill as a corporation, and, in decrees made in the cause, has been recognized as such, the question cannot be afterwards raised therein whether the proceedings had in order to its incorporation were regular or effectual. *Howard v. The La Crosse and Milwaukee Railroad Co.*, 49
- INDIAN RESERVATIONS.—See JURISDICTION, 2, 3, 4, 5, 8.
- INDICTMENT.—See CRIMINAL LAW, 3.
- INJUNCTION—
- I. ON A BILL FOR SPECIFIC PERFORMANCE.
1. *When Allowed*.—On a bill for specific performance of a contract, an injunction should be granted if,

upon the case made therein, the court ought to entertain it, and the defendant will, probably, before the hearing, render itself incapable of executing the contract specifically. <i>Ross v. Union Pacific Railway Company (Eastern Division)</i> , . . .	Page 26
2. <i>When not</i> .—But if it does not state a case on which, at the hearing, specific performance will be decreed, an injunction, which is sought only to make the final decree effective, ought not to be allowed, . . .	ib.
II. INJUNCTIONS IN VACATION AND WHEN THEY EXPIRE.	
1. <i>Solely Statutory</i> .—In courts exercising equitable jurisdiction, injunctions are allowed by the judge in vacation solely under the authority of a statute. <i>Gray v. Chicago, Iowa, and Nebraska Railroad Company</i> , . . .	63
2. <i>By District Judge</i> .—An injunction allowed by a district judge, by virtue of the power conferred upon him by the act of February 13, 1807 (2 Statutes at large, 418), expires at the commencement of the term next succeeding its allowance, . . .	ib.
3. The 55th rule in equity does not remove the limitation, . . .	ib.
(1.) <i>Argu</i> .—The terms of the rule rightly construed do not remove the limitation, . . .	ib.
(2.) <i>Argu</i> .—If they did, as the rule would then operate a repeal of the statute, it would be in excess of the authority of the court to establish it, . . .	ib.
4. The judges of the supreme court have power to grant injunctions in vacation, which do not expire with the vacation, . . .	64
See LAND OFFICERS, 2, 5.	

INLAND NAVIGATION.—See ADMIRALTY, 2, 3, 4, 5, 6, 7;
CONSTITUTIONAL LAW, 5; STATUTES, 1, 2, 3.

INSOLVENT DEBTOR.—See BANKRUPTCY.

INSPECTION.—See FERRY-BOAT, 2, 3, 4.

INSURANCE—

I. WHEN ABANDONMENT OF ASSURED PROPERTY IS JUSTIFIED.

1. *Extent of Damage*.—A policy of insurance on a steam-

boat provided that the assured should have no right of abandonment unless the damage should amount to half the value of the vessel as stated in the policy, which was \$45,000. She was in fact worth only \$25,000. To justify abandonment, only \$2500 could, after the injury, have remained in her. <i>Copeland v. The Phoenix Insurance Company,</i>	Page 278
II. OBLIGATIONS OF ASSURED IN CASE OF LOSS.	
1. <i>To make Loss light.</i> —The assured are required to exercise all reasonable care, skill, and diligence to make the loss as light as possible,	<i>ib.</i>
2. <i>Liability for Master's neglect.</i> —The owner is not excused, though he give proper directions, if the master of the vessel does not observe them, and, through such neglect, the damages are increased,	279
(1.) This is on the principle that the master is the owner's agent, and the latter is liable for the neglect of the former,	<i>ib.</i>
3. <i>Owner's Negligence.</i> —If the master does not remain in the vessel a reasonable time to repair the injury, and constructs an imperfect bulkhead, which is not fastened to the hull so as to exclude the water when once pumped out; and shortly afterwards another officer raises her in a short time, by supplying the defects, the owner is held to be guilty of negligence, and has no right to abandon her to the underwriters,	<i>ib.</i>
III. WHAT IS NOT ABANDONMENT.	
1. <i>Equivocal Words.</i> —The owner, when he heard of the accident, notified his underwriters, and said that he had telegraphed the master that if he could not raise the vessel, he should wreck her, and the underwriters answered, "all right:" held not to be an abandonment by the owner, nor an acceptance of abandonment by the underwriter,	<i>ib.</i>
<i>Argu.</i> —The direction of the owner to the master was an assertion of his right to control the vessel. The defendants might well infer that the owner would claim the wreck, and call for indemnity after its value should be deducted from the loss,	<i>ib.</i>
IV. OF REPAIRING AND TENDERING THE INJURED VESSEL.	
1. <i>Unjustifiable Delay.</i> —After the defendants had notice of the loss, and before they took possession to raise	

and repair her, fifteen days elapsed, during which time, as they knew, the machinery, &c., was being removed, all which, if she were to be repaired, would have to be replaced : <i>held</i> , that this delay was unjustifiable,	Page 279
2. <i>Condition of Vessel</i> .—When the vessel is tendered by the underwriters to the assured, she must be in such condition that the latter, when receiving her, would have full indemnity for all the injury covered by the policy,	<i>ib.</i>
3. <i>Gross Defects in Repairs</i> .—When the deficiencies are obvious, so that, to be seen, they do not need to be pointed out, and are very great as compared with the repairs actually made, it is not incumbent on the assured to point them out, in order to justify his refusal of the vessel, and to maintain his action on the policy,	<i>ib.</i>
See AGENCY, 4, 5, 6, 7.	

INTENT.—See CRIMINAL LAW, 3 ; REMOVAL OF CAUSES, 13 ;
TRADE REGULATIONS, 3.

INTERESTED WITNESS.—See WITNESS, 1, 2, 3, 4.

INTERNAL REVENUE—

I. OF THE LIABILITY OF INTERNAL REVENUE OFFICERS FOR ILLEGAL ASSESSMENTS, AND WHEN SUITS MAY BE BROUGHT AGAINST THEM THEREFOR.

1. It is but common justice to hold answerable in damages an executive officer who, under color of his office, commits an illegal trespass upon the rights of a citizen. *Cohens v. Abel*, 293
2. The Internal Revenue Act of July 13, 1866 (14 Statutes at large, 98), contemplates such cases and such prosecutions, *ib.*
3. But the right to sue for such injuries may be, and in that act is, regulated, so that the action must be brought within, or shall not be brought until the expiration of, a specified time, *ib.*
4. The object of the provision is to give to the commissioner, who is authorized to “remit, refund, or pay back taxes illegally assessed or collected,” and

to pay the costs and expenses of suit, and the judgments recovered therein, an opportunity to learn the facts of the case, and determine what is right to be done,	Page 293
5. If he delays his decision six months after the appeal, the action may then be brought,	<i>ib.</i>
See REMOVAL OF CAUSES, 1; WITNESS, 2, 3.	
INTERPRETATION.—See CONTRACT, 2.	
INTER-STATE COMMERCE.—See ADMIRALTY, 2, 3, 4, 5, 6, 7, 19, 20; CONSTITUTIONAL LAW, 5, 6, 7; DOMESTIC COMMERCE, 2.	
IOWA CODE.—See MANDAMUS, 1, 2; TAXES, 1, 2 (1), (2), 4.	
JUDGMENT.—See RECEIVER, 5.	
JUDICIAL NOTICE.—See BANKRUPTCY 7 (2); TRADE REGULATIONS, 7.	
JURISDICTION—	
I. FEDERAL JURISDICTION OF CRIMES.	
1. <i>Relations and Place</i> .—Congress may legislate in respect of murder only where the crime is connected with some subject matter, or was committed within some place, which brings it within the Federal jurisdiction; as military posts, Indian country, &c. <i>United States v. Ward</i> ,	17
II. FEDERAL JURISDICTION OVER INDIAN RESERVATIONS IN KANSAS.	
1. <i>Act of June 30, 1834</i> .—This act (4 U. S. Statutes at large, 729) confers upon the Federal courts jurisdiction of offences against the laws of the United States, committed within what is now the State of Kansas, unless since its passage the locality has been withdrawn from the force and effect of that act,	<i>ib.</i>
2. The act admitting the State into the Union withdraws all the territory within the boundaries therein described from the Federal jurisdiction,	<i>ib.</i>
3. But the act excepted out of the State boundaries territory of Indians having treaties with the United	

States, which treaties provided that such territory should not, without the consent of such Indians, be subjected to the jurisdiction of a State, . . .	Page 17
4. The converse is inferable, that the territory which was not covered by such treaty should be subject to the State jurisdiction, . . .	<i>ib.</i>
III. JURISDICTION IN RESPECT OF CITIZENSHIP OF PARTIES TO CROSS BILLS.	
1. <i>Both Parties Citizens of same State</i> .—A cross bill will be sustained in the Federal court where a defendant is compelled to avail himself of that mode of defence, in order to protect himself from an injustice resulting to him from the position in which the cause stands, although the parties plaintiff and defendant, or some of them, are citizens of the same State; provided the defendants in such bill are already before the court, and are, as parties to the original bill, subject to its jurisdiction. <i>Schenck v. Peay and Bliss</i> , . . .	175
IV. FEDERAL JURISDICTION IN KANSAS.	
1. <i>Admission to the Union</i> .—The United States, when it admitted Kansas into the Union, although retaining the title to the land which it then owned within the State, parted with the jurisdiction over it, so far as the general purposes of government are concerned, with certain reservations and exceptions. <i>United States v. Stahl</i> , . . .	192
2. These reservations and exceptions were :	
(1.) Lands of Indian tribes having treaties with the United States which exempt them from State jurisdiction, . . .	<i>ib.</i>
(2.) The right to tax lands of the United States, and of Indians, . . .	<i>ib.</i>
3. <i>Forts not excepted</i> .—Forts of the United States might have been, but were not, excepted, . . .	<i>ib.</i>
4. <i>Jurisdiction within Forts</i> .—In respect of jurisdiction within forts, Kansas is on the same footing as the original States. Her consent is necessary to the exercise by the United States of jurisdiction within them, . . .	<i>ib.</i>
V. WITHDRAWAL OF JURISDICTION FROM STATE.	
1. <i>Consent</i> .—In order to withdraw from a State a jurisdiction which it has once exercised, and confer it	

on the general government, the consent of the former is a pre-requisite. This is the material point aimed at in the constitution, . . .	Page 192
VI. JURISDICTION NOT VESTED IN UNITED STATES.	
1. <i>Instance</i> .—Fort Hacker was, in 1863, established as a military post on government land in Kansas, and the United States has always retained the fee. In 1861, Kansas was admitted into the Union on an equal footing with the original States, with boundaries which included the lands on which the fort was established: <i>held</i> , that the fort is not within the jurisdiction of the Federal courts to punish the crime of murder committed therein, .	193
VII. AMOUNT NECESSARY TO APPELLATE JURISDICTION IN CIRCUIT COURT.	
1. Whether, upon a contested application of a bankrupt for a discharge, a debt or damages are claimed, amounting to more than \$500, so as to vest in the circuit court appellate jurisdiction, <i>quære?</i> <i>Rud-dick v. Billings</i> ,	330
See ADMIRALTY, 9, 11, 13, 14, 15, 16, 17, 20 ; BANKRUPTCY, 7 ; CIRCUIT COURT, 1, 2 ; CONSTITUTIONAL LAW, 7 ; ERROR ; LAND OFFICERS, 5 ; REMOVAL OF CAUSES.	
KANSAS.—See JURISDICTION, 2, 3, 4, 5, 7, 8, 9, 10, 12 ; MORTGAGE, 2 (1), (2), (3).	
LACHES.—See RECEIVER, 4.	
LAND OFFICERS—	
I. POWER OF THE COURTS OVER EXECUTIVE OFFICERS.	
1. <i>The Register and Receiver</i> are mere agents of the interior department to carry out its orders. <i>Litch-field v. Register and Receiver</i> ,	300
2. <i>Injunction</i> .—The court will not interfere by injunction with executive officers in the exercise of political or discretionary power,	<i>ib.</i>
3. <i>Judicial character</i> .—In acting upon a claim to pre-empt a tract of land, the land officers exercise a judicial discretion,	<i>ib.</i>
4. <i>Title in Third Parties</i> .—And it seems that this is	

true, even when a third party has a good title to the land to which the claim is made, . . .	Page 300
5. <i>Jurisdiction over their Judgments</i> .—In the cases in which the action of these officers has been examined and revised by the courts, jurisdiction has not been assumed until after the land department has ceased to act upon the matter, . . .	ib.
6. <i>Unlike certain other Injunctions</i> .—This case is not within the principle of cases of injunction restraining road and other commissioners, and other bodies, from taking property not in pursuance of the authority of the law, . . .	ib.
7. The argument from convenience applied, . . .	ib.
See PARTIES, 1, 2.	

LAND SALES—

I. COMBINATIONS TO PREVENT COMPETITION.

1. *No defence to Parties not injured*.—A party who is not himself injured thereby cannot defeat the title of the purchaser at a sale by auction of public land, by showing that a combination to prevent competition in bidding was formed, by means of which persons were prevented from bidding, and land, worth at the time \$50 per acre, was obtained for \$1.25 per acre. *Root v. Shields*, . . . 340

LEASE.—See RECEIVER, 3, 4, 5.

LEX LOCI—

I. CONTRACT.

1. *Personal Property*.—A contract of a corporation relative to personal property will be governed by the law of that State in which it is incorporated and has its principal place of business, and within which the property is situated and the contract was made. *Samuel v. Holladay*, . . . 400

LIS PENDENS—

I. EFFECT OF SUITS AND DECREES ON HOLDERS OF BONDS.

1. *Bonds and the coupons attached*, issued by counties, payable to bearer, possess all the qualities of commercial paper, . . . 69
2. *The pendency of a suit* to restrain the transfer of such

securities, and a decree in such suit that they be delivered up to be cancelled, are inoperative as respects a <i>bona fide</i> holder for value, . . .	Page 69
3. <i>But if he have actual knowledge</i> of proceedings when he becomes the owner and holder, he is concluded by them. <i>Durant v. Iowa County</i> , . . .	<i>ib.</i>
SEE COUPONS, I. (1), (2).	

MANDAMUS—

I. PRACTICE IN AWARDING AND ENFORCING.

1. *Under Iowa Code.*—The chapter on the “Action of *Mandamus*,” of the Revised Code of Iowa, changes the character of the writ to an action for the enforcing of any right to which it may be applicable. *Rusch v. The Supervisors of Des Moines County*, . . . 313
2. *Not adopted by this Court.*—This chapter has never been adopted by this court as a rule of practice, and can have no force here, . . . *ib.*
3. *Proceeding here according to Common Law.*—This court, in applications for *mandamus*, has always proceeded according to the course of the common law, . . . 314

II. PROCESS FOR CONTEMPT AGAINST BOARD OF OFFICERS.

1. *Disobedience of Mandamus.*—When a *mandamus* is awarded, directed to a board of officers, composed of several members, commanding the performance of an official act by them as a board, and they do not obey it, but one writ of attachment should go against them for this contempt, . . . 377
 2. *Consolidation.*—If more than one writ is issued, and each is entered as a separate case, they will be consolidated, . . . *ib.*
- See TAXES, 2 (1), (2).

MARITIME LAW.—See ADMIRALTY.

MARINE INSURANCE.—See INSURANCE.

MARSHAL.—See COSTS, 1.

MASTER OF VESSEL.—See ADMIRALTY, 1, 2, 3, 4, 6, 7.

MATE OF VESSEL.—See ADMIRALTY, 5.

MEANDERED LINE.—See PRE-EMPTION, 1.

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MILITARY SENTENCE—

I. CONFINEMENT OF CITIZEN.

1. *Presentment by Grand Jury*.—A person arrested in New Orleans in 1865, charged with offences committed in Mobile in 1863, and tried at St Louis, must be discharged from confinement in which he is held by sentence of a military commission, if the grand jury organized next after a list of prisoners so held is furnished to the judges, do not present him to the court for trial. *In re The Petition of William Murphy*, 141
See CONSTITUTIONAL LAW, 3.

MORTGAGE—

I. POSSESSION OF PROPERTY BEFORE FORECLOSURE.

1. Owners of the equity of redemption are entitled to possession until foreclosure. *Souter v. La Crosse Railroad*, 80

II. FORECLOSURE BY STATUTE OF KANSAS.

1. *Construction of Act*.—It was the intention of the legislature to provide in this act. *Samuel v. Holladay*, 400
 - (1.) That mortgages of real estate should be foreclosed by proceedings in the court of the county in which the premises are situated, *ib.*
 - (2.) That all deeds of trust, whether of real or personal property, should be foreclosed in the same manner as mortgages, *ib.*
 - (3.) That all foreclosures, whether of mortgages or deeds of trust, and whether of real or personal property, should be by action in the courts under the code of civil procedure, *ib.*
See AGENCY, 1, 2, 3.

MOTIVE.—See ARRESTING DESERTERS, 7 ; CRIMINAL LAW, 3.

MURDER.—See ARRESTING DESERTERS, 6, 7, 8, 9 ; CRIMINAL LAW, 1, 2, 3.

NAVAL ATTACK.—See ADMIRALTY, 9, 10, 11, 12, 13, 14, 16, 17.

NAVIGATION.—See ADMIRALTY, 1, 2, 3, 4, 5, 6, 7, 18, 19, 20; CONSTITUTIONAL LAW, 5, 6; STATUTES, 1, 2, 3.	Page
NEBRASKA, ORGANIC ACT.—See PRE-EMPTION, 9.	
NEGLIGENCE.—See AGENCY, 5, 6; INSURANCE, 3, 4 7.	
NOTICE.—See CONTEMPT, 1, 2, 3.	
NUISANCE.—See STATUTES, 1, 2, 3.	
OFFICERS.—See BOARD OF OFFICERS.	
ORIGINAL BILL.—See PLEADING, 5, 6.	

PARDONS—

I. BY THE PRESIDENT—EFFECT.

1. *Pleader bound by Conditions*.—A party accepting and pleading a pardon in a judicial proceeding, admits that he is bound by the conditions mentioned therein. *Brown v. United States*, . . . 198
2. *May be Plead*.—The supreme court has not formally declared its opinion upon the effect of such pardons, but in two instances of cases pending, it has permitted them to be plead, . . . *ib.*
3. *Reinvestiture*.—But there is no difference of opinion among the judges that they restore forfeited property to the party dispossessed thereof by the offence so pardoned, subject to exceptions mentioned therein, and also excepting property vested by judicial proceedings in other parties, . . . *ib.*
4. *No Adverse Right vested*.—Until an order is made for the distribution, or for payment to the informer, or into the treasury of the United States, no vested right has attached which prevents a restoration of the proceeds to the owner, . . . *ib.*

II. PLEADING A PARDON.

1. *Property Sold but not Distributed*.—A party, whose property had been confiscated by the judgment of the court and sold, but the proceeds of which had not yet been distributed, asked of the district court leave to file a petition, alleging a pardon for the

offences on account of which the proceedings were had, and praying an order directing payment to him of money in the hands of the marshal. That court having refused the leave, the circuit court, on writ of error, reversed its order in that behalf, with directions to receive the petition, and proceed to hear the same,	Page 198
See ALIEN ENEMY, 7, 8, 9.	

PAROL EVIDENCE.—See EVIDENCE, 5, 6, 7, 8.

PARTIES—

I. IN EQUITY.

1. *Land Officers*.—The register and receiver of the land office have no personal interest in the public lands, or in lands claimed to be such. *Litchfield v. Register and Receiver*, 299
 2. *As Sole Defendants*.—An injunction bill against such officers as the sole defendants, to restrain them from permitting settlers on lands treated by the land department as public lands, entering them under the pre-emption laws, when such settlers are not before the court, is fatally defective for want of parties, *ib.*
 3. *Necessary Parties*.—Parties whose interests in the subject matter of the suit and in the relief sought are so bound up with those of other parties that their legal presence in the proceeding is absolutely necessary, must be brought before the court, or it will refuse to entertain the suit, *ib.*
 4. *Impossibility of bringing them in*.—It is no answer to such an objection that it is impossible to bring such parties before the court, *ib.*
 5. *Injunction not retained*.—Nor will the court retain an injunction once allowed to enable the plaintiff to bring them in, when it is apparent that he cannot do so, *ib.*
- See ADMINISTRATOR, 3, 4, 5; ALIEN ENEMY; BANKRUPTCY, 4, 6, 7; CONTRACT, 1; CONTEMPT, 4; CORPORATION, 6, 7, 8, 9, 10, 11; JURISDICTION, 6; LAND SALES, 1; PARDON, 5; REMOVAL OF CAUSES, 7, 8 (1).

PARTNER.—See CONTRACT, 2.

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PETITION.—See BANKRUPTCY, 1, 3, 4.

PILOT.—See ADMIRALTY, 1, 2, 3, 4, 18.

PLEADING—

I. PLEADING IN DETINUE.

1. *Artificial Words not to Govern*.—Notwithstanding the artificial words of a declaration in detinue, if the action be grounded on a tortious seizure by the defendant of the property mentioned, it will not be held, contrary to the fact, an action on contract. *Elgee's Administrator v. Lovell*, 102

II. PLEADING UNDER ACTS OF CONGRESS.

1. *Confiscation Act*.—The bar to an action provided in section 6 of the act of July 17, 1862 (12 U. S. Statutes at large, 591), commonly known as the Confiscation Act, applies only to property seized under the act. A plea which does not allege that the property was seized under the act is bad, 103
2. *Abandoned Property*.—A plea based on the act of March 3, 1863 (12 U. S. Statutes at large, 820), relating to abandoned property, which does not aver that the property had been taken in a district which had been declared in insurrection, is bad, *ib.*
3. *Special Property*.—The plea must exclude the idea of any special property in the plaintiff, with a present right of possession in him, in order to be good, *ib.*

III. DETERMINING CHARACTER OF BILL.

1. *Independent or Ancillary*.—The Federal court, in determining whether a bill is original and independent, or ancillary and auxiliary to a matter already before the court, does not confine itself to the line which, in chancery pleadings, divides original from cross cases and supplemental bills, but looks to the essence of the matter, and to principles adopted by them with reference to the question of their jurisdiction of the parties. *Schenck v. Peay & Bliss*, 176
2. *Case where Cross Bill is proper*.—S., a citizen of Ohio, filed his bill against P. and B., citizens of Arkansas. As against P., he asked that his title to the real

	Page
1. <i>May be non-residents.</i> —When litigants in the Federal courts are required to give security, their sureties need not be residents of the State in which the suit is pending,	80
III. WHEN NO SUPERSEDEAS BOND IS GIVEN.	
1. If the unsuccessful party to a decree does not give a <i>supersedeas</i> bond, he cannot complain if the decree be enforced, notwithstanding any injury to which he may be thereby subjected,	ib.
IV. REMEDY TO RECOVER PROPERTY SEIZED UNDER ABANDONED PROPERTY ACT.	
1. <i>Exclusive in Court of Claims.</i> —The remedy provided by the act of March 3, 1863, for the recovery of property captured or abandoned in the enemy's country, whether the capture be in accordance with its provisions or not, is exclusive in the court of claims. <i>Elgee's Administrator v. Lovell</i> ,	103
(1.) <i>Argu.</i> —This position is supported by a consideration of the circumstances of the agent of the treasury who collects the property,	ib.
(2.) <i>Argu.</i> —The act contemplates that in some instances property will be seized which should be returned to the owner,	ib.
(3.) <i>Argu.</i> —The act makes the Government the holder of the proceeds of the property in trust for such claimant as may appear and show himself entitled to it. It can be recovered from the Government only by such proceedings as it may authorize,	ib.
V. ARREST OF PARTY IN ONE DISTRICT AND HIS REMOVAL TO ANOTHER FOR TRIAL.	
1. <i>Examination.</i> —A person arrested in one district, for an offence committed in another, who has not been indicted, nor committed by a commissioner, is entitled to an examination in the district in which he is arrested,	422
VI. LETTERS UPON THE ARREST AND REMOVAL OF ACCUSED PERSON.	
1. <i>Power to grant Order, in whom.</i> —The power to order the removal of a person so accused from the district in which he is found to the one in which he should be tried, seems to rest in the district judge,	

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and not in the circuit judge. <i>So Mr Justice Miller, intimates. Mr District Judge Love, contra,</i>	422
See ADMINISTRATOR, 1, 2, 3, 4, 5; ADMIRALTY, 8, 10; AGENCY, 7; ALIEN ENEMY, 1, 7, 8, 9, 10; BANKRUPTCY, 1, 2, 3, 4, 5, 6, 7; BOARD OF OFFICERS, 1, 2, 3, 4; CIRCUIT COURT, 1, 2, 3; CONSTITUTIONAL LAW, 3, 7; CONTEMPT, 1, 2, 3, 4, 5; CORPORATION, 6, 7, 8, 9, 10, 11; COSTS, 1, 2; CRIMINAL LAW, 1, 2; ERROR, 1, 2, 3, 4, 5, 6, 7; INCORPORATION, 1; INJUNCTIONS, 1, 2, 3, 4, 5, 6; JURISDICTION, 6, 13; LAND OFFICERS, 2, 3, 4, 5, 6; LAND SALES, 1; MANDAMUS, 1, 2, 3, 4, 5; MILITARY SENTENCE, 1; MORTGAGE, 2 (1), (2), (3); PARDON, 2, 5; PARTIES, 2, 3, 4, 5; PLEADING, 5, 6, 7, 8, 9; RECEIVER; REMOVAL OF CAUSES; STATUTES, 1, 2, 3; TAXES, 1, 2, 3; WITNESS.	3

PRE-AGREEMENT—See ADMIRALTY, 4.

PRE-EMPTION.

I. BOUNDARY OF GOVERNMENT LANDS LYING ALONG LAKES AND RIVERS.

1. *Meandered Line*.—The boundary to lands bordering on rivers and lakes is the meandered line established by the Government surveyors. *Granger v. Swart,* 88
2. *Alluvion*.—If, at the date of an entry of Government land, one of the boundaries of which is such meandered line, the lake or river extends to and borders on such line, accretions afterwards formed belong to the party holding title under the entry, 25.
3. *Waste Land*.—But if, at the time the entry was made, between such line and the bank of the lake or river there was a body of swamp or waste land, or flats, on which grass grew, horses and cattle fed, and hay was cut, such land was not included within the entry, 25.

II. INTEREST OF PRE-EMPTION SETTLERS.

1. *Inchoate Right*.—Settlers upon the public lands under the pre-emption and homestead laws have

an <i>inchoate</i> right, which they should be permitted to perfect into a legal title. <i>Litchfield v. Register and Receiver</i> ,	Page 299
III. CIRCUMSTANCES SHOWING INTENTION.	
1. <i>Acts of Party</i> .—A party who goes into possession of a small parcel of a tract of Government land under a claim of right inconsistent with a pre-emption claim; who sells and repurchases the property as town lots; who, in a document wherein he is required to state his residence, states it as being elsewhere; who removes, and remains long absent from the land; and who from the first never asserts any pre-emption right to the tract, cannot be deemed to have intended to claim such right. <i>Root v. Shields</i> ,	340
IV. PRIORITY OF ENTRY.	
1. A pre-emption entry not affected by a radical infirmity will be upheld as against a subsequent purchaser,	341
V. LANDS NOT SUBJECT TO PRE-EMPTION.	
1. <i>Within limits of incorporated town</i> .—Lands included within the limits of an incorporated town are not subject to entry under the pre-emption law of September 4, 1841 (5 U. S. Statutes at large, 453),	<i>ib.</i>
2. <i>Mischiefs of the Act</i> .—This provision of the statute affords no room for the mischief of including lands within the limits of a city, in order to exclude them from the operation of the law,	<i>ib.</i>
3. <i>Not Repealed by Organic Act of Nebraska</i> .—The provision is not repealed by the organic act providing that the legislature of the territory of Nebraska shall not interfere with the primary disposal of the soil (10 U. S. Statutes at large, 277),	<i>ib.</i>
(1.) <i>Argu.</i> —The same language has been used for over fifty years in acts admitting new States into the Union, and their power to incorporate towns on the public lands was never questioned,	<i>ib.</i>
(2.) <i>Argu.</i> —The withdrawal of the lands from the operation of the pre-emption law, is the effect of the act of Congress, and not of the municipal charter,	<i>ib.</i>
(3.) <i>Argu.</i> —The provision of the organic act was	

	aimed at a direct claim of proprietorship on the part of the territory,	Page 341
4.	<i>The extent of land</i> which may be included within a city is not limited by the act of May 23, 1844 (5 U. S. Statutes at large, 657), providing for the corporate authorities pre-empting for the citizens three hundred and twenty acres of the town site,	<i>ib.</i>
5.	<i>Policy of Provision.</i> —The provision excepting such lands from the operation of the pre-emption act was inserted, as were other exceptions, to secure to the Government the enhanced value of lands in and adjoining a town,	<i>ib.</i>
VI.	BONA FIDE PURCHASERS.	
1.	<i>Not protected.</i> —Although they have purchased without any knowledge in fact of any defect in their title, yet parties will not be protected as <i>bona fide</i> purchasers :	
(1.)	Who purchased before the patent of the Government issued, because until then the fee is in the United States, and the pre-emptor and his grantees hold only an equity,	342
(2.)	When the defect arises out of a rule of law of which they are bound to take notice,	<i>ib.</i>
(3.)	When the title acquired is absolutely void,	<i>ib.</i>
	See LAND OFFICERS, 1, 2, 3, 4, 5, 6, 7 ; PARTIES, 1, 2	
	PRESENTMENT BY GRAND JURY. —See CONSTITUTIONAL LAW, 3 ; MILITARY SENTENCE, 1.	
	PRESIDENT OF THE UNITED STATES. —See ALIEN ENEMY, 7, 8 ; TRADE REGULATIONS, 6.	
	PREVENTING COMPETITION. —See LAND SALES, 1.	
	PRINCIPAL AND AGENT. —See AGENCY.	
	PRIORITY OF ENTRY. —See PRE-EMPTION, 6.	
	PRIZE COURT. —See ADMIRALTY, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17.	
	PROCESS. —See VARIOUS HEADS. ,	

PROCLAMATION.—See ALIEN ENEMY, 7, 8.

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PUBLIC LANDS.—See GOVERNMENT LANDS, 1 ; JURISDICTION, 7, 8, 9, 10, 11 ; PRE-EMPTION.

RAILROADS.—See CONSTITUTIONAL LAW, 6 ; RECEIVER, 1, 2, 3, 4, 5 ; SPECIFIC PERFORMANCE, 2, 3, 6.

RATIFICATION.—See CORPORATION, 5.

REAL ESTATE.—See ADVERSE POSSESSION ; BOARD OF OFFICERS, 1, 2 ; CORPORATION, 1, 2, 3 ; JURISDICTION, 7, 8, 9 ; LAND OFFICERS, 4 ; MORTGAGE ; PARTIES, 1 ; PRE-EMPTION.

REASONABLE DOUBT—

1. *Rule*.—Before finding a defendant guilty of murder, the jury should be satisfied of his guilt beyond a reasonable doubt. *United States v. Gleason*, . . . 129
2. *Fivolous doubt*.—Such doubt is not every possible doubt, however slight, or however unfounded, such as beset some minds on all occasions, . . . *ib.*
3. *Rationally founded*.—It should be founded on something connected with the case as disclosed by the testimony, which leaves in the mind a rational uncertainty as to guilt not removed by any other matter in the testimony, . . . *ib.*

RECEIVER—

I. DISCHARGE OF RECEIVER IN CHANCERY.

1. *Security*.—A railroad, ninety-five miles long, being a link in an important route, whose gross annual earnings are \$800,000, in good condition, is ample security for mortgage debts thereon amounting to \$2,200,000 ; and a receiver of such road, appointed at suit of a party on whose debt \$300,000 is offered to be paid, and who has a decree which provides for sale in case of default of payment as therein provided, will be discharged. *Howard v. La Crosse and Milwaukee Railroad Co.*, . . . 49
2. *Other Remedy*.—A receiver of such road will be discharged, who was appointed on a creditor's bill, showing a judgment for \$16,000, when the plain-

tiff enjoys all the ordinary remedies for enforcing his lien, and has received only \$1000 for four years, during which the receiver has been in possession of the road,	Page 49
3. <i>Possession Reverts</i> .—A party having, as security for a large debt, a lease of such road, from whom the possession was taken by the receiver, is, upon his discharge, entitled to have possession restored to him,	50
4. <i>Right Forfeited</i> .—But a party holding such lease, who has failed to pay sums which he therein stipulated to pay as consideration therefor, and who, by reason of his failure in that behalf, has lost possession, and permitted the property to remain out of his possession for four years exposed to the hazards of sale, has lost his right of possession,	<i>ib.</i>
5. <i>Decree invalidating Judgment</i> .—An unreversed decree, declaring that the judgment to secure which such lease was made was invalid, and setting it aside, will have a persuasive influence towards discharging a receiver appointed, or sought to be retained for its benefit,	<i>ib.</i>
II. APPOINTMENT OF RECEIVERS IN CHANCERY.	
1. <i>Made on Disputed Equity reluctantly</i> .—The court of chancery will only with great reluctance and hesitation take the possession of property from a defendant having a clear legal title thereto, when the relief sought is founded on a disputed equity. <i>Schenck v. Peay & Bliss</i> ,	176
2. <i>But it may be done</i> under proper circumstances. There is no absolute rule against it,	<i>ib.</i>
3. <i>Fatal Defect in Title</i> .—But if the party against whom the appointment of a receiver is sought has himself shown a fatal defect in the title under which he claims, he stands in a different position from a party whose legal title and possession is assailed, and who has not admitted the truth of the allegations against him,	<i>ib.</i>

REGISTER AND RECEIVER.—See LAND OFFICERS.

REINVESTITURE.—See PARDON, 3.

REMOVAL OF ACCUSED PERSON.—See PRACTICE, 5, 6.

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REMOVAL OF CAUSES FROM STATE TO FEDERAL COURTS.

I. CAUSES INVOLVING THE VALIDITY OF TITLES UNDER THE DIRECT-TAX LAW.

1. *Act of 1833 still in force—Exception.*—The provisions of the act of March 2, 1833 (4 U. S. Statutes at large, 632), relating to the removal of causes from State to Federal courts, are still in force, except as to cases arising under the internal revenue system. *Peyton v. Bliss*, 170
2. *Direct Taxes upon States.*—The act imposing direct taxes upon the States (2 U. S. Statutes at large, 294), is not within this exception, *ib.*
3. *That Act is a Revenue Law*, and therefore cases arising under it are subject to removal under the act of 1833, *ib.*
4. *Cases considered.*—The Insurance Co. v. Ritchie, 5 Wallace, 541, and The City of Philadelphia v. The Collector, 5 Wallace, 720, commented on and distinguished, *ib.*

II. UNDER THE 12TH SECTION OF JUDICIARY ACT.

1. *Citizenship.*—Under the provisions of the 12th section of the judiciary act (1 U. S. Statutes at large, 79), the right of removal was granted only to a defendant who was an alien, or a citizen of a State other than that in which the suit was brought. *Johnson v. Gilbert C. Monell*, 390
2. *When Right should be Claimed.*—It was incumbent on the defendant to claim the right at the time of entering his appearance in the State court, *ib.*

III. UNDER THE ACT OF MARCH 2, 1867.

1. *By either Party before final Trial.*—The act of March 2, 1867 (14 U. S. Statutes at large, 558), allows to a plaintiff, as well as to a defendant, the right of removal, and he may exercise it at any time in the course of the litigation prior to final hearing or trial, *ib.*
2. *Conditions.*—The only conditions on which the right depends are :
 - (1.) *Parties.*—That the controversy shall be between a citizen of the State in which the suit is brought, and a citizen of another State, *ib.*

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(2.) <i>Amount</i> .—That the matter in dispute exceeds \$500, exclusive of costs,	390
(3.) <i>Affidavit</i> .—That the non-resident citizen shall fill an affidavit stating that he believes, and has reason to believe, that from prejudice or local influence he will not be able to obtain justice in the State courts,	<i>ib.</i>
(4.) <i>Security</i> .—That he give the requisite security for his appearance, and filing copy of the record in the Federal court at the proper time,	391
IV. THE ACT OF 1867 IS CONSTITUTIONAL.	
1. <i>Constitutional Provision</i> .—The sentence in the constitution which confers on the Federal courts jurisdiction over causes arising under the constitution and laws of the United States, confers on the same courts jurisdiction over causes between citizens of different States. The terms are as broad in one case as in the other,	<i>ib.</i>
2. <i>Twenty-fifth Section of Judiciary Act</i> .—Under the twenty-fifth section of the Judiciary Act, ever since the organisation of the Federal judiciary system, jurisdiction has been exercised over the former class of cases after the final judgment in the highest courts of the State. If that has been rightful, then the right of removal at any stage of a cause must be rightful,	<i>ib.</i>
V. TERMS OF ACT OF 1867 CONSIDERED.	
1. <i>A Voluntary Change of Residence</i> by a party, so that jurisdiction on account of citizenship arises, even if made after the suit was brought, does not affect the right of removal,	<i>ib.</i>
2. <i>Question of Costs</i> .—It is only a question of costs, as a plaintiff, after his voluntary change of residence, might discontinue in the State court, and bring his action in the Federal court,	<i>ib.</i>
3. <i>The Intent</i> with which a person moves from the State, in the courts of which a suit is pending to which he is a party, so that by reason of citizenship the Federal courts may have jurisdiction, and he be enabled to remove the cause thereto, is not an objection to the removal, provided his citizenship in another State be real,	<i>ib.</i>

REPAIR AND TENDER OF VESSEL.—See INSURANCE, 6, 7, 8.

REPEALS BY IMPLICATION—

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|---|------------|
| 1. <i>Implication must be Irresistible</i> .—Only a necessary and irresistible implication will be held to operate a repeal of a statute. <i>United States v. 10,000 Cigars</i> , | 123 |
| 2. <i>What is not such Repeal</i> .—A general law was passed, admitting interested parties to testify as witnesses in all cases; afterwards, a special law was passed, admitting interested parties to testify in a certain contingency: <i>held</i> , that the later did not repeal the earlier provision, | <i>ib.</i> |

RESERVATIONS (INDIAN).—See JURISDICTION, 4, 5, 8, (1).

RESIDENTS.—See REMOVAL OF CAUSES, 5, 6, 8 (1), 9, 11, 12, 13.

RETROACTIVE STATUTES—

- | | |
|---|------------|
| 1. <i>Power to Enact</i> .—Congress may pass retroactive statutes, provided they are not <i>ex post facto</i> . <i>Schenck v. Peay & Bliss</i> , | 177 |
| 2. <i>Intention to be clearly expressed</i> .—But in construing statutes for which a retrospective effect is claimed, to give them such construction, the intention of the legislature in that regard must either be expressly declared, or must appear by unavoidable implication, | <i>ib.</i> |
| 3. <i>Statute construed</i> .—A statute declaring, in the future tense, that a majority of a board of tax-commissioners shall have full authority to transact the business of the board, and that no proceedings of the board shall be void or invalid in consequence of the absence of one of them, refers to the exercise of the power granted for the future to a majority of the board, | <i>ib.</i> |
| 4. <i>Past Defects</i> .—Such a statute does not cure defects in title arising out of past transactions, | <i>ib.</i> |
| 5. <i>Non-existence of Board</i> .—Such act does not cure the defect of the non-existence of any tax-board whatever, | <i>ib.</i> |

REVENUE.—See REMOVAL OF CAUSES, 1, 2; TAXES.

REVIEW.—See ERROR, &c.

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SALE.—See AGENCY, 1, 2, 3; CONTRACT, 2; LAND SALES.

SEA-GOING VESSELS.—See ADMIRALTY, 1, 18, 20.

SECRETARY OF INTERIOR.—See LAND OFFICERS, 1.

SECURITY.—See RECEIVER, 1; REMOVAL OF CAUSES, 8, (4).

SEIZURE.—See PLEADING, 3; PRACTICE, 4; WITNESS.

SENTENCE.—See MILITARY SENTENCE.

SETTLERS.—See PRE-EMPTION.

SHERIFF.—See BANKRUPTCY, 7.

SHIPS AND SHIPPING.—See ADMIRALTY.

SPECIFIC PERFORMANCE OF CONTRACTS—

I. WHEN ENFORCED AND WHEN NOT.

1. *Not for Delivery of Government Bonds.*—Bonds of the United States are public stocks, and a covenant for their delivery will not be specifically enforced in a court of equity. *Ross v. Union Pacific Railway Company (Eastern Division)*, 26
2. *Nor of Railroad Shares.*—The reason of the case is in favour of holding the rule the same, in respect of shares in a railroad company, *ib.*
 - (1.) They belong to a class of securities generally called stocks, are bought and sold every day in the market, and the prices at which they sell are quoted in the commercial reports. One share has no peculiar value. The damages for failure to deliver them may be awarded at law, and afford complete compensation, *ib.*
 - (2.) So are the earlier cases, *ib.*
3. *Nor unless complete Relief afforded.*—Unless the court can decree specific performance of the whole of a contract, it will not interfere to enforce any part of it: *e.g.*, A contract for the delivery of both Government stocks and railroad bonds, assuming

that the latter may be compelled, cannot be enforced,	Page 27
4. <i>Nor unless Remedy is mutual.</i> —An executory contract will not be specifically enforced, unless the remedy is mutual,	<i>ib.</i>
II. WHAT IS EXECUTORY CONTRACT.	
1. The performance of a comparatively inconsiderable part of a contract— <i>e. g.</i> , the expenditure of \$50,000 in building a railroad which will cost \$12,000,000—does not take it out of the class of executory contracts,	<i>ib.</i>
III. BUILDING CONTRACTS ENFORCED.	
2. <i>Railroad.</i> —A contract to build a railroad will not be enforced in equity,	<i>ib.</i>
3. <i>Other like Contract.</i> —The case of <i>Lucas v. Comford</i> (3 Brown's Ch., 166), in which Lord Thurlow refused to enforce a building contract, saying that the court would not undertake to superintend the construction of a building, has not been overruled; and the cases in which it has been held otherwise are distinguishable from it,	<i>ib.</i>
4. <i>When such Contracts have been enforced.</i> —The cases in which specific performance of building contracts has been decreed in equity, are where :	
(1.) The building was to be done upon the land of the person who agreed to do it,	<i>ib.</i>
(2.) The consideration for the agreement was the sale or conveyance of the land on which the building was to be erected, and the plaintiff had already, by such conveyance on his part, executed the contract,	<i>ib.</i>
(3.) The building was in some way essential to the use, or contributory to the value, of adjoining land belonging to the plaintiff,	<i>ib.</i>
(4.) The court could dispose of the matter by an order capable of being enforced at once. It will not decree a party to perform a continuous duty extending over a number of years,	<i>ib.</i>
See INJUNCTION, 1, 2.	

STATUTE OF FRAUDS—

1. *New Consideration.*—A promise founded on a new consideration, made to one who owes a third

	Page
party, to pay the debt, is not within the statute of frauds. <i>Phelps v. Clasen</i> ,	204

STATUTORY POWERS.—See BOARD OF OFFICERS, 1, 2, 3, 4.

STATUTES—

I. FORCE OF LAW ON PENDING LITIGATIONS.

1. *An Act declaring a Bridge a lawful structure*, pending a suit to have it declared a nuisance, has the effect to remove the ground of complaint made against it. *The Clinton Bridge*, 150
2. *The Act* (14 U. S. Statutes at large, 412), by its own terms seems to do so, for it describes the bridge as a bridge already erected; and Congress must have known of the complaints made against it, *ib.*
3. *It removes the Objection*.—It makes lawful the bridge which was before unlawful; and the court must be governed by the law as it is when it is called upon to act, *ib.*

See ADMIRALTY, 2 (2), 18, 19, 20; ARRESTING DESERTERS; BANKRUPTCY; BOARD OF OFFICERS; CONSTITUTIONAL LAW; CORPORATION, 2; CRIMINAL LAW; ERROR, 4; FERRY-BOAT, 2, 3, 4; INJUNCTION, 3, 4, 5, 6; JURISDICTION; MANDAMUS, 1; MORTGAGE, 2; PLEADING, 2, 3; PRACTICE, 4; PRE-EMPTION, 7, 8, 9, 10, 11; REMOVAL OF CAUSES, 1, 2, 3, 5, 7, 8, 9, 10, 11, 12, 13; REPEALS BY IMPLICATION; RETROACTIVE STATUTES.

STOCKHOLDERS.—See CORPORATION, 9, 10, 11.

STOCKS.—See SPECIFIC PERFORMANCE, 1, 2.

STORAGE OF CARGO.—See ADMIRALTY, 5.

SUBROGATION.—See AGENCY, 7.

SUPPLEMENT.—See PLEADING, 8.

SUPREME COURT JUSTICES.—See INJUNCTION, 6.

SURETIES.—See PRACTICE, 2; REMOVAL OF CAUSES, 8 (4).

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TAXES—

I. NOT ENFORCED BY COMMISSIONERS.

1. *Under Iowa Statute.*—Proceedings to enforce levy and collection of a tax should not be by appointment of commissioners even under Iowa statutes. *Rusch v. Supervisors of Des Moines Co.* . . . 314
2. *Chapter on Mandamus of Iowa Code.*—This chapter does not authorize an order appointing a special commission to levy a tax upon a country whose officers have, in disobedience to the command of a *mandamus*, neglected to levy a tax to raise money to pay a judgment, . . . *ib.*
 - (1.) This chapter extends the remedy only to compel the performance of a duty, the breach of which is followed by damages, . . . *ib.*
 - (2.) The court should not appoint a person to discharge the official duties of an officer whose appointment, functions, and qualifications are prescribed by law, . . . *ib.*
3. *Application to discretion of Court is declined for difficulties.*—The application for the appointment of a commissioner to levy the tax is addressed to the discretion of the Court; and will be declined on account of the difficulties attending it, . . . *ib.*
 - (1.) *County Treasurer should not be displaced.*—The county treasurer, whose sole duty it is to collect the tax, has never refused to perform his duty, and it cannot be assumed that he will do so. He has most important and delicate duties to perform in enforcing the tax. He should not be displaced by a court, . . . *ib.*
 - (2.) *Nor Assessors.*—The assessors are not in default. They should not be displaced. Were the commissioner to attempt to levy the tax upon the last valuation of property, he would be powerless to compel the records of that assessment from the officer who had been summarily removed, . . . *ib.*

II. CONSTITUTIONALITY OF IOWA ENACTMENT.

1. If the statute of Iowa confers such power, it is in conflict with the constitution of that State, . . . *ib.*

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(1.) That constitution declares that the three departments, the legislative, the executive, and the judicial, shall each be kept separate from either of the others,	314
(2.) It also provides that no local or special law shall be passed relative to taxes,	ib.
See BOARD OF OFFICERS, 4 ; REMOVAL OF CAUSES, 2, 3.	
 TIME.—See ALIEN ENEMY, 1, 2, 3, 10 ; CRIMINAL LAW, 4, 5, 6, 7 ; ERROR, 6 ; INJUNCTIONS, 4, 5, 6 ; INSURANCE, 6 ; MILITARY SENTENCE, 1 ; PLEADING, 7, 8, 9 ; PRACTICE, 1 ; PRE-EMPTION, 2, 6, 12 (1) ; REMOVAL OF CAUSES, 6, 8 (4), 11 ; RETROACTIVE STATUTES, 3, 4 ; STATUTES, 1, 3.	
 TITLE.—See ADVERSE POSSESSION ; BOARD OF OFFICERS, 1 ; CORPORATION, 1, 2, 3 ; LAND SALES, 1 ; PRE-EMPTION ; RECEIVERS, 8 ; WAREHOUSE RECEIPTS, 3.	
 TRADE REGULATIONS—	
I. TWENTY-SECOND RULE.	
1. <i>Object of Rule.</i> —The object of the twenty-second rule of the trade regulations of September 11, 1863, was to prevent gold coins reaching the rebels in any manner, as well by gift, trade, or exchange, as even by being exposed to being taken by violence by them. <i>United States v. \$4000 American Gold Coin</i> ,	217
2. <i>Terms of Rule.</i> —In order to attain this object, the terms of the rule absolutely prohibit the introduction of gold coin into the region declared to be in insurrection,	ib.
3. <i>Intention.</i> —The intention with which a party transports gold coin into such territory, alleged to be merely to convey it to his home therein, and retain it as an investment, does not relieve the transaction from a charge of violating the rule,	ib.
 II. GOLD COIN.	
1. Gold coin would at any time be held to be included within the terms, "Goods and chattels, wares and merchandise,"	ib.
2. <i>An Article of Trade.</i> —At the time the twenty-second rule, trade regulations, was made, the fact was, that	

gold coin was bought and sold as personal property in open market, at fluctuating relations to the actual current money of the country,	Page 217
3. <i>Executive may Act</i> .—It was competent for the President and Secretary of the Treasury to act on this fact in framing those rules and regulations, . . .	<i>ib.</i>
4. <i>Judicial Notice</i> .—And even without such action on their part, the court should take judicial notice of the fact, well known to every citizen, that gold coin has ceased to be used in the business of the country as money, and has become an article of merchandise and traffic,	<i>ib.</i>
TREATIES.—See CONSTITUTIONAL LAW, 5; JURISDICTION, 4.	
TRUST AND TRUSTEE.—See CORPORATION, 1, 2, 3; MORTGAGE, 2 (2).	
UNITED STATES COURTS.—See CIRCUIT COURTS; JURISDICTION, &c.	
VACATION.—See INJUNCTION, 3, 4, 5, 6.	
VERBAL CONTRACT.—See AGENCY, 4.	
VESTED RIGHT.—See PARDON, 4.	
WAREHOUSE RECEIPTS—	
1. <i>Representatives of Property</i> .—Warehouse receipts have by custom come to be considered in commercial transactions as representatives of the property mentioned in them. <i>McNeil v. Hill</i> ,	96
2. <i>Effect of Indorsement</i> .—Such faith and credit are given to warehouse receipts, that their indorsement and delivery are regarded as equivalent to the delivery of the article,	<i>ib.</i>
3. <i>Estoppel</i> .—A person who has given a warehouse receipt is estopped by principles of public policy from showing, in an action between himself and a party deriving title from the party to whom the receipt was given, that it was a mere security for a loan of money,	<i>ib.</i>

WASTE LAND.—See PRE-EMPTION, 3.	Page
WITHDRAWAL OF JURISDICTION.—See JURISDICTION, 3, 11.	
WITNESS—	
I. STATUTE MAKING INTERESTED PARTIES COMPETENT WITNESSES.	
1. <i>Cases of a Civil Nature</i> .—The phrase “Civil action,” in the 3d section of the act of July 2, 1864 (13 U. S. Statutes at large, 351), includes all cases of a civil, as contradistinguished from those of a criminal nature. <i>United States v. 10,000 Cigars</i> , . . .	123
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